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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1373

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF NEW YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,

Appellants,

v.

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L. FRIEDERSDORF, JOAN D. AIKENS, THOMAS E. HARRIS, JOHN W. McGARRY, FRANK P. REICHE, EDMUND L. HENSHAW, JR., J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and G. WILLIAM MILLER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Statutory Framework	3
Description of Proceedings	4
Rulings Below and Appeals	6
The Questions Are Substantial	7
Expenditure Limitations as an Unconstitutional Condition	9
The Right of Individuals to Engage in Political Activity	19
The Right to Make Political Contributions	31
CONCLUSION	33
APPENDIX—	
A. Judgment of the Three-Judge Court	1a
B. Joint Findings of Fact	3a
C. Opinion of the Three-Judge Court	44a
D. Certification of Constitutional Questions	64a
E. Opinion of the Court of Appeals, *en banc*	67a
F. Notice of Appeal to the Supreme Court of the United States	69a

PAGE

STATUTORY APPENDIX—

Federal Election Campaign Act of 1971, as amended, (2 U.S.C. § 431 *et seq.*) SA1

Presidential Election Campaign Fund Act, as amended, (26 U.S.C. § 9001 *et seq.*) SA81

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 519 F.2d 817 (D.C. Cir. 1976) 6n
Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*

Civil Service Commission v. *Letter Carriers*, 413 U.S. 48 (1974) 18
Cohen v. *California*, 493 U.S. 15 (1971) 26, 27

Mills v. *Alabama*, 384 U.S. 214 (1966) 27
Monitor Patriot v. *Roy*, 401 U.S. 265 (1971) 7

Perry v. *Sinderman*, 498 U.S. 593 (1972) 18
Police Department v. *Mosley*, 408 U.S. 92 (1972) 30, 31

Street v. *New York*, 394 U.S. 576 (1969) 26, 27

United States v. *O'Brien*, 391 U.S. 367 (1968) 24

Statutes and Regulations:

2 U.S.C. § 431(8)(b)(i) 26
2 U.S.C. § 431(8)(b)(ii) 26
2 U.S.C. § 431(8)(b)(iii) 26
2 U.S.C. § 431(8)(b)(iv) 26
2 U.S.C. § 431(8)(b)(vi) 4, 29

PAGE

2 U.S.C. § 431(8)(b)(ix) 20
2 U.S.C. § 431(8)(b)(xi) 20
2 U.S.C. § 431(9)(b)(iii) 4, 29
2 U.S.C. § 431(9)(b)(v) 4, 29
2 U.S.C. § 431(17) 26
2 U.S.C. § 437g 4
2 U.S.C. § 437h 5, 7
2 U.S.C. § 441a(a)(1) 4
2 U.S.C. § 441a(a)(1)(A) 4
2 U.S.C. § 441a(a)(1)(C) 4
2 U.S.C. § 441a(a)(7)(B) 4, 20
2 U.S.C. § 441a(b) 4
2 U.S.C. § 441a(b)(1)(B) ..... *passim*
2 U.S.C. § 441a(c) 3, 4
2 U.S.C. § 441b(b)(2) 4, 29
26 U.S.C. § 9003(b) ..... *passim*
26 U.S.C. § 9004(a) 2, 5, 32
26 U.S.C. § 9006 3
26 U.S.C. § 9011(b) 2, 5, 6
26 U.S.C. § 9012 4
28 U.S.C. § 1254(1) 7
28 U.S.C. § 1331 ..... 6n
11 C.F.R. § 114.5(e) 4
11 C.F R. § 141.2(d) 3, 15

PAGE

Legislative History:

Sen. Rep. No. 93-170, 93d Cong., 1st Sess. (1973) 11

Sen. Rep. No. 93-310, 93d Cong., 1st Sess. (1973) 11

Sen. Rep. No. 93-689, 93d Cong., 1st Sess. (1974) 10, 11, 14

Sen. Rep. No. 93-981, 93d Cong., 2d Sess. (1974) 11

Sen. Rep. No. 94-677, 94th Cong., 2d Sess. (1976) 13

H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. (1976) 13

H.R. Rep. No. 93-1239, 93d Cong., 2d Sess (1974) 11

H.R. Rep. No. 94-917, 94th Cong., 2d Sess. (1976) 13

10 Presidential Documents 1285 (Oct. 21, 1974) 11

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement

Appellants Republican National Committee, The Ripon Society of New York, Inc., Paul C. Cardamone, and John A. Schmid appeal from the final judgment entered on February 13, 1980, by a Three-Judge Court of the United States District Court for the Southern District of New York. This judgment (which is printed at Appendix A) upheld the constitutionality of certain provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.*

This judgment is one of three arising from a single complaint and involving identical issues and identical parties. Review of the other judgments is being sought in each case. The jurisdictional provisions which have necessitated multiple judgments are discussed at pp. 4-6, *infra*.

Opinions Below

The opinions below consist of Joint Findings of Fact and an Opinion, neither of which has yet been reported. The Joint Findings of Fact are printed at Appendix B, and the Opinion is printed at Appendix C.

Jurisdiction

The final judgment was entered on February 13, 1980. The suit is brought under 26 U.S.C. § 9011(b). The jurisdiction of the Supreme Court to hear this appeal also rests upon 26 U.S.C. § 9011(b). This appeal is being docketed in this Court within 90 days from the entry of the judgment from which appeal is taken and should be accorded expedited treatment pursuant to 26 U.S.C. § 9011(b).

This appeal challenges the validity of certain provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.* (hereinafter the "Fund Act") and certain provisions of the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974, 1976 and 1979, 2 U.S.C. § 431 *et seq.* (hereinafter the "FECA"). The principal provisions at issue are 26 U.S.C. §§ 9003(b) and 9004(a) and 2 U.S.C. § 441a(b)(1)(B). The texts of both the Fund Act and the FECA are printed in the Statutory Appendix to this Jurisdictional Statement.

Questions Presented

(1) Do the campaign expenditure limitations imposed by the FECA on presidential candidates who accept public campaign funding under the Fund Act violate those candidates' rights under the First, Fifth and Ninth Amendments to the Constitution?

(2) Do the prohibitions imposed by the FECA on personal expenditures or contributions by individual citizens in support of publicly-funded campaigns violate those individuals' rights under the First, Fifth and Ninth Amendments to the Constitution?

Statement of the Case

Statutory Framework. Title 26 U.S.C. § 9006 establishes a Presidential Election Campaign Fund. To become eligible for such public funding, a presidential candidate must certify to the Federal Election Commission (hereinafter the "Commission"): (1) that he or she will not incur expenses in excess of the total public funding to which the candidate is entitled, 26 U.S.C. § 9003(b)(1); and (2) that he or she has not accepted and will not accept any private contributions except to make up a deficiency in the Presidential Election Campaign Fund, 26 U.S.C. § 9003(b)(2). An irrevocable decision to accept or reject public funding must be made within 14 days after a candidate's nomination. 11 C.F.R. § 141.2(d).

The amount a major party candidate may receive from the Fund is limited to the amount that candidate may spend under the limitations established by 2 U.S.C. § 441a(b)(1)(B). The statutory spending limit is $20,000,000 as adjusted to changes in the Consumer Price Index, or roughly $29,000,000 in 1980. 2 U.S.C. § 441a(c).

If a candidate rejects public funding, that candidate must finance a presidential campaign from private contributions of $1,000 or less in the case of individuals and $5,000 or less in the case of political committees which have been registered for six months and contribute to the campaigns of several candidates. 2 U.S.C. § 441a(a)(1). The contribution limit is not indexed for inflation. *Compare* 2 U.S.C. § 441a(a)(1)(A) and (C) *with* 2 U.S.C. § 441a(b) and (c).

The statutory definition of "contribution" includes not only amounts given directly to a campaign but also any sum spent by individuals to support political activities in cooperation or concert with a campaign, such as duplicating or disseminating campaign materials. 2 U.S.C. § 441a (a)(7)(B).

The statutory definitions of "contribution," 2 U.S.C. §§ 431(8)(b)(vi) and 441b(b)(2) and "expenditure," 2 U.S.C. §§ 431(9)(B)(iii), 431(9)(B)(v) and 441b(b)(2), however, exempt from regulation communications "on any subject" between a labor organization and its members and their families. 2 U.S.C. § 441(b)(2)(A). Such "internal communications" may thus be funded in unlimited amounts from unrestricted sources. The AFL-CIO federation is treated as a single union for the purposes of internal communications. 11 C.F.R. § 114.5(e). The same provisions of the FECA permit a corporation to finance similar internal communications with shareholders and executive and administrative personnel.

The provisions of both the FECA and the Fund Act are accompanied by a variety of civil and criminal penalties. 2 U.S.C. § 437g; 26 U.S.C. § 9012.

Description of Proceedings. On June 16, 1978, appellants filed this action in the United States District Court for

the Southern District of New York. The complaint challenged the validity under the First, Fifth and Ninth Amendments to the Constitution of those portions of the FECA and the Fund Act which (1) impose campaign expenditure limitations on major party presidential nominees receiving public campaign funding and (2) prohibit individual citizens from making expenditures or contributions in support of the campaigns of candidates receiving public funding.

Under 2 U.S.C. § 437h, the District Court must certify constitutional questions arising under the FECA to the Court of Appeals, *en banc,* with expedited appellate jurisdiction in the Supreme Court. Under 26 U.S.C. § 9011(b), a Three-Judge Court must be convened to "implement or construe" the Fund Act, with expedited appellate jurisdiction in the Supreme Court.

Under these related jurisdictional provisions, the accepted practice has been for the District Court to take evidence as necessary, to make findings of fact and to certify to the *en banc* Court of Appeals constitutional questions arising under the FECA. *Buckley* v. *Valeo,* 424 U.S. 1, 9 (1976). Because the FECA and the Fund Act are part of an integrated statutory scheme—for example, the Fund Act requires candidates applying for federal campaign financing to certify under 26 U.S.C. §§ 9003(b) and 9004(a)(1) that they will comply with the expenditure limits contained in 2 U.S.C. § 441a(b)(1)(B)—constitutional issues arising under these two statutes are generally heard together by the § 9011(b) Three-Judge Court (composed of two judges of the Court of Appeals and a District Judge) and the Court of Appeals, *en banc. Buckley, supra,* at 9 n.3.[1]

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[1] By virtue of the recent repeal of 28 U.S.C. § 2282 (providing for Three-Judge Courts in actions seeking to enjoin acts of Congress), it is now also necessary for a Single-Judge District Court,

After convening, the § 9011(b) Three-Judge Court ordered the parties in this case to expedite the development of a written trial record. On June 22, 1979, voluminous deposition transcripts and other evidence were submitted to the § 9011(b) Three-Judge Court and the § 437h Single-Judge District Court.

On October 12, 1979, the Three-Judge Court and the Single-Judge District Court issued Joint Findings of Fact (Appendix B). On October 12, 1979, the District Court also certified to the Court of Appeals, *en banc,* constitutional questions arising under the FECA (Appendix D).

Rulings Below and Appeals. On February 5, 1980, the Three-Judge Court filed an Opinion holding that the challenged provisions of the Fund Act were constitutional and that appellants' complaint must be dismissed (Appendix C). On February 6, 1980, the Court of Appeals, *en banc,* filed an opinion upholding the constitutionality of the FECA "substantially for the reasons set forth in the opinion of the three-judge court * * *." (Appendix E). Judgment was entered by the Court of Appeals, *en banc,* on February 6, 1980, by the Three-Judge Court on February 13, 1980, and by the Single-Judge District Court (concurring in the judgment of the Three-Judge Court) on February 19, 1980.

Appellants filed a notice of appeal from the judgment of the Three-Judge Court to take the instant appeal to the Supreme Court (Appendix F). Appellants also filed a notice of appeal from the judgment of the Court of Appeals,

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sitting under 28 U.S.C. § 1331, to consider constitutional challenges to the Fund Act; this is necessary "to protect against the contingency that the Supreme Court might eventually hold that * * * [the Fund Act] issues should be decided by" a single District Judge, *Buckley, supra,* 519 F.2d 817, 819 (D.C. Cir. 1976), if this action does not fall within the "implement or construe" language of 26 U.S.C. § 9011(b).

en banc, to the Supreme Court and a notice of appeal from the judgment of the Single-Judge District Court to the Court of Appeals with the intention of seeking a writ of certiorari before judgment.

Consequently, appellants are this day also filing a separate jurisdictional statement under 2 U.S.C. § 437h to docket their appeal from the judgment of the Court of Appeals, *en banc,* and a petition for a writ of certiorari before judgment under 28 U.S.C. § 1254(1) and Supreme Court Rule 20 to review the decision of the Single-Judge District Court.

The Questions Are Substantial

The questions in this case go to the very heart of the First Amendment. The statutory provisions challenged here directly limit the amount of money a candidate for the office of President of the United States may spend on campaign activities. They also prevent individuals from spending even the most modest amounts to fund their own or their neighbors' political activities in support of a presidential campaign. Because a limit on political spending "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached," *Buckley* v. *Valeo, supra,* at 9 (1976) and because the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for public office," *Monitor Patriot* v. *Roy,* 401 U.S. 265, 272 (1971), the issues raised are central to the role of a constitutional provision safeguarding fundamental freedoms. Therefore, appellants urge this Court to review expeditiously the constitutionality of a statutory scheme which limits how much presidential candidates may expend on political speech and bars pri-

vate citizens from effective participation in the process of selecting a president. Expedited review in this Court is specifically required under the applicable jurisdictional provisions, 26 U.S.C. § 9011(b) and 2 U.S.C. § 437h, and, moreover, expedited review is essential since a decision in these cases may profoundly effect the upcoming presidential election.[2]

Under the FECA and the Fund Act, presidential candidates must choose between *limited* private financing and a *limited* public subsidy. Private financing is subject to contribution limits which severely restrict the amounts which can be raised, and therefore spent, for campaign purposes. The limited public subsidy, on the other hand, is available only as an exclusive source of campaign funds. No other option is legally open to a candidate for president. Governmental policy thus directly affects the amount of speech in which a presidential candidate may engage.

In reality, moreover, a presidential candidate does not have even that limited choice, for the only practical alternative is to accept the public subsidy. Because raising even $1 in private contributions for the general election automatically disqualifies a candidate for the federal campaign subsidy and because a final decision must be made within two weeks of a candidate's nomination, acceptance of the public funding is the only safe course. The Three-Judge Court found that a candidate who declines the federal subsidy runs a "great" risk. Findings of Fact, p. 24; 27a.[3]

[2] See pp. 4-7 of the Jurisdictional Statement seeking an appeal from the decision of the Court of Appeals, *en banc*.

[3] References to Joint Findings of Fact will be cited in two forms. The first number, i.e. "Findings of Fact, p. —", identifies pages of the Joint Findings of Fact as transmitted to the Court of Appeals and the Three-Judge Court. The second number, i.e. "—a", identifies the pages of the Appendix where the cited findings can be located. References to the Opinion of the Three-Judge Court will be cited in two forms. The first number, i.e. "Opinion, p. —" identifies pages of the Opinion of the Three-Judge Court as filed on February 5, 1980. The second number, i.e. "—a", identifies the pages of the Appendix where the cited portion of the Opinion can be located.

Moreover, fund raising experience under the contribution limits demonstrates that private financing is not a feasible choice in the short time available. That conclusion becomes more compelling with each election, for while the amount of public financing fund is indexed for inflation, the contribution limit is not. In constant 1974 dollars, for example, the individual contribution limit is now $550, while the public subsidy has kept pace with inflation.

The statutory provisions of the Fund Act also prohibit individuals from making any expenditures whatever to fund local grass roots activities in support of campaigns. The Three-Judge Court found that this direct prohibition on political advocacy has eliminated a traditional means of funding grass roots activities in presidential campaigns from the "bottom up". Findings of Fact, p. 13; 16a. As a consequence, local citizens find themselves isolated from a campaign which takes place almost exclusively on television, while would-be volunteers, hoping to participate in their nation's choice of a chief executive, are turned away. See pp. 19-24, *infra*. Citizens hoping to organize campaigns and campaign activities in local communities find that personal expenditures to that end, even one dollar, are illegal. Such restrictions on the freedom of individuals to engage in political advocacy raise fundamental First Amendment issues.

Expenditure Limitations as an Unconstitutional Condition. The constitutional status of expenditure limits has been authoritatively decided. In *Buckley, supra*, the following question was certified to this Court:

> (a). Does [the FECA] violate [the First Amendment] in that it forbids expenditures by candidates for federal office in excess of the amounts specified . . .?

The answer given by this Court was: "YES".

424 U.S. at 59 n.67.

It has thus been held, after thorough consideration and in unmistakable terms, that Congress may not limit expenditures for political communication. This Court recognized:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. (Footnote omitted).

424 U.S. at 19.

Notwithstanding the undisputed invalidity of expenditure limits, federal law presently imposes such limits in the nation's most important electoral contest. Candidates are compelled to choose between *limited* private financing and *limited* public financing. Whereas public financing is limited to the entitlement specified by statute, private financing is restricted by the stringent limits on the size of contributions. The Senate Report accompanying the 1974 Amendments acknowledged that the contribution limitations would impair the ability of candidates to raise funds. Sen. Rep. No. 93-689, 93d. Cong., 2d Sess. 4-5 (1974).[4] In the six years since then, moreover, the contribution limit has become, as a consequence of inflation, even more restrictive on candidates' fundraising.[5]

Government is thus directly involved in determining the quantum of speech allowed presidential candidates. While

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[4] The Three-Judge Court simply ignored the effect of the contribution limits. In passages critical to its holding, it asserted that presidential candidates had the option of "unlimited private funding", Opinion, pp. 5-6; 50a-51a, and, astonishingly enough, cited Richard Nixon's 1972 campaign as evidence of the present ability of candidates to raise large amounts of money. *Id.* Of course, a principal purpose of the 1974 Amendments was to put an end to that kind of fundraising. Sen. Rep. No. 93-170, 93d Cong., 1st Sess. 1-2 (1973); Sen. Rep. No. 93-310, 93d Cong., 1st Sess. 1-2 (1973); H.R. Rep. No. 93-1239, 93d Cong., 2d Sess., 3-4 (1974). Sen. Rep. No. 93-689, 93d Cong., 2d Sess. 4-5 (1974); 10 Presidential Documents 1285 (Oct. 21, 1974); *Final Report of the Senate Select Comm. on Presidential Campaign Activities,* Sen. Rep. No. 93-981, 93d Cong., 2d Sess. 493-98, 581, 590-93, 612-616, 635-48 (1974) (discussing abuses associated with large contributions in the 1972 campaign).

[5] A report prepared at the Kennedy School and commissioned by the House Administration Committee to assess the impact of the FECA concluded that the effect of contribution limits on campaign financing has been draconian. It concluded:

> Simply put, the limit was set too low in 1974 and the consequences of this error have been profound. Under current restrictions, candidates have not been able to raise sufficient funds; resources have not kept pace either with escalating campaign costs or with the level of funding consonant with a healthy electoral system.

An Analysis of the Impact of the Federal Election Campaign Act, 1972-1978, from the Institute of Politics, John F. Kennedy School of Government, Harvard University, prepared for the Committee on House Administration of the United States House of Representatives (October, 1979), p. 9.

the severe limitations on contributions serve the purpose of eliminating corruption or the appearance of corruption, *Buckley, supra,* at 26, this Court specifically has held that no such compelling reason justifies expenditure limits.[6] *Id.* at 55-57. To the contrary, it stated that, with limits on the size of contributions, "[t]here is nothing invidious, improper or unhealthy in permitting [private] funds to be spent to convey the candidate's message to the electorate." *Id.* at 56.[7]

[6] The Three-Judge Court found a governmental interest justifying expenditure limits in the elimination of obligations to large contributors, Findings of Fact, p. 7; 10a. This purpose was explicitly rejected by this Court as a justification for expenditure limitations. *Buckley* v. *Valeo, supra,* at 55. As this Court stated there, government's interest in eliminating dependence upon large contributions is served by limits on contributions rather than on expenditures. In any event, the "obligations" of private financing, if any, are considerably greater in the case of campaigns without public funding than in the case of a candidate who receives $29,000,000 to begin with. Yet, the Three-Judge Court argued that such limits may be applied only in the latter case. The Three-Judge Court also asserted that expenditure limits were justified by a governmental interest in reducing the burdens of private fund raising. Opinion, p. 9; 54a. That is a peculiar rationale since the interest in reducing those burdens is to give a candidate more time to campaign. Expenditure limits, however, reduce the need for private financing only by reducing the opportunities to campaign. The burdens of fund raising are, moreover, much less in the case of a campaign which receives public financing than in those which do not. Indeed, the presidential general election campaign, which begins with a subsidy of $29,000,000, seems the least likely election in which expenditure limits might be imposed for the purpose of reducing the rigors of fundraising.

[7] *Buckley* remains authoritative on this issue. The 1974 FECA enacted campaign expenditure limits for all campaigns for federal office, House, Senate and Presidential, whether publicly-financed or not, for reasons common to each office. In 1976, this Court found those reasons insufficient to support expenditure limits, but suggested that such limits might survive constitutional scrutiny if attached as a condition to public campaign financing. 424 U.S. at 57 n.65. See note 8, *infra.*

The legislative history of the 1976 Amendments attaching expenditure limits only to publicly-financed campaigns reveals no new Congressional purpose. The reenactment was in all respects treated as little more than a technical amendment. Sen. Rep. No. 94-677, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 69 (1976), H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 54, 56 and 59 (1976). *Buckley* thus remains dispositive on the issue of whether a compelling governmental interest justifies expenditure limits.

Candidates do not, moreover, as a practical matter, have a real choice between public funding with expenditure limits and limited private financing.[8] The imposition of

[8] In a footnote to the *Buckley* opinion, the Court suggested expenditure limits might be attached as a condition to the receipt of public financing. The text of that footnote reads:

> For the reasons discussed in Part III, *infra,* Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

424 U.S. at 57 n.65.

The footnote is dictum since the unconstitutional condition issue was not raised in that case and was not argued by the parties. Indeed, it could not have been argued since the limitations on spending in presidential elections contained in former 18 U.S.C. Section 608(c) applied to all candidates, whether or not they received federal funding.

The dangers in relying upon dictum are particularly evident in the case of Footnote 65. Since compliance with expenditure limits was a legal command for all candidates, neither the parties nor this Court explored the concept of voluntariness. The candidate described in footnote 65 who "voluntarily limit[s] the size of the contributions he chooses to accept . . ." has reasons independent of a governmental preference—ideological, tactical, etc.—for taking that risk. Of course, a candidate may "voluntarily" accept expenditure limits for similar reasons. Where such a true waiver occurs, however, laws such as the FECA and the Fund Act are not necessary. Such laws are needed only in the case of candidates who want to raise small contributions in excess of the campaign expenditure limits and will *not* voluntarily forego that right. It is no answer to argue that candidates who want to eschew private financing may fear being outspent by their opponent. The candidates described in footnote 65 who voluntarily limit the size of

a $1,000 limit on individual contributions by the 1974 Amendments drastically altered the nature of fundraising in presidential campaigns. Previously, multimillion dollar contributions were possible, and large amounts could be raised from relatively few donors. The Senate Report accompanying the 1974 amendments flatly stated that public financing was made necessary by the $1,000 contribution limitation, which clearly impaired the ability of candidates to raise funds. Sen. Rep. No. 93-689, 93d Cong., 2d Sess. 4-5 (1974). An important Congressional purpose in providing public financing was thus to compensate candidates for the reduction in campaign receipts resulting from the limitations on individual contributions.

Had Congress intended a real choice, it would have indexed for inflation the contribution limits as well as the amount available under the Fund Act. At the moment, the contribution limit is roughly $550 in constant 1974 dollars. As each year passes, acceptance of public financing becomes a greater imperative. If inflation continues at the rate of the last four years, for example, the contribution limit in 1984 will be less than $300 in constant 1974 dollars.

The statutory scheme requires that a candidate's decision must be made quickly and in a state of great uncertainty. Experimentation with private fundraising is not possible since the law requires that a candidate applying for public financing certify that not one cent of contributions for the general election has been accepted. 26 U.S.C. § 9003(b)(2). The application and accompanying certification must be filed within fourteen days of the candi-

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contributions they will accept run exactly that risk. If a decision to accept expenditure limits is truly voluntary, there must be a corresponding freedom to reject them without sacrificing a governmental benefit. The present statutory structure of the Fund Act does not permit such a voluntary choice.

date's nomination. 11 C.F.R. § 141.2(d). The choice presidential candidates must make, therefore, is between the certainties of public financing and the grave uncertainties of raising private contributions. The Three-Judge Court specifically found that the risk of choosing private financing is "a great one", Findings of Fact, p. 24; 27a, a finding which is more than adequate to demonstrate involuntariness.

In any event, experience under the contribution limits demonstrates that private fundraising is so difficult that only a foolhardy candidate would forego public funding. Black Dep., pp. 25-26, 81-82. Briefly stated, there is no historic evidence from which a candidate might reasonably conclude that private fundraising under the FECA's contribution limits would be better than the amount received under the Fund Act. Black Dep., pp. 25-26, 79-85. In 1976, President Ford and Governor Reagan each raised more money than any other candidate. FEC Exhibit V, p. 17. If, in the short time between nomination and election, roughly three months, the 1980 Republican candidate raised as much as Ford and Reagan together raised in over a year, that candidate would still be $16.5 million short of even equaling the amount available under public financing ($29 million plus 20% for costs of private fundraising), without taking into account the severe cash flow problems caused by private financing. The record indicates that raising money under the contribution limits is very time consuming, Black Dep., pp. 26-27, 103-105, and would create cash flow problems since many services, including media, air travel, hotels and telephone, require "up front" payment. Black Dep., pp. 16-17, 25-30, 85; Triplett Dep., p. 16. Public funding is, of course, received in a lump sum at the beginning of the campaign.

The Three-Judge Court, moreover, adopted a sweeping theory which, if allowed to stand, would subvert our most

fundamental rights. The Court argued that since candidates are legally free to reject public funding, their acceptance of expenditure limits is voluntary. Since the Court's decision is based on a waiver theory, the nature of the constitutional right waived is irrelevant, as is the government's purpose in requiring the waiver. The decision would thus validate a "voluntary" waiver of a candidate's right not to be censored as well as of the right to make unlimited political expenditures.

Voluntariness as used by the Three-Judge Court means only that a recipient of a federal grant explicitly agrees to waive a constitutional right when applying for the grant. This cannot be the law. A waiver of a constitutional right should be recognized only when government adopts a stance of strict neutrality toward the relinquishment of that right. Government ought not have the power to bargain with its citizens for their constitutional rights and federal courts ought not be in the business of deciding whether the offers it makes are sufficiently compelling.

In the case of the FECA and the Fund Act, government is hardly neutral. It has on the one hand severely limited the ability of candidates to raise private contributions while providing $29,000,000 for campaigning only on the condition that candidates agree in advance to limit expenditures and forbid all private contributions, including the most modest expenditures by individuals to fund personal, local grass roots activities.

The reasoning of the Three-Judge Court enlarges government's power beyond all established constitutional bounds. For example, if one substitutes "the university" for "the candidate" and "research capability" for "campaign funds", the opinion of the Three-Judge Court would

justify any and all governmental limits on, or censorship of, research by universities receiving federal grants.[9]

If anything, controlling research in universities is an *a fortiori* case under the theory of the Three-Judge Court, since universities are not burdened by a legal limitation on the size of private contributions (or prohibitions on corporate contributions) they may raise, and research may be less central to First Amendment values than political advocacy in a presidential campaign.

The Three-Judge Court's view is not consistent with the "unconstitutional condition" doctrine as established by

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[9] An opinion upholding the censorship of university research might read as follows:

> "[A]s long as [the university] remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the first amendment rights of [the university or its researchers]."

Compare Opinion at 6; 51a.

Or:

> "[T]he [research] fund act merely provides a [university] with an *additional* funding alternative which [it] would not otherwise have and does not deprive the [university] of other methods of funding which may be thought to provide greater or more effective [support for research] than would public funding. Since the [university] remains free to choose between funding alternatives, [it] will opt for public funding only if, in the [university's] view, it will *enhance* the [university's] [research capabilities]. . . . Plaintiffs contend that they must as a practical matter accept public funding because without it they would raise less money privately and thus have less [research capability], and at the same time they urge that the effect of public funding is to inhibit [research]. Even if we accepted the claim that they are in practice compelled to opt for public funding, its effect would be to facilitate and enlarge their [research] capabilities over what [they] would otherwise be rather than to inhibit or reduce them. Hence, the limitation [on research] imposed by [the Act] cannot violate the first amendment rights of the [university].

Compare Opinion, pp. 8-9; 53a-54a.

this Court, which forbids government from conditioning the receipt of governmental benefits on a condition which would otherwise be unconstitutional unless there exists a compelling governmental purpose. *Compare Perry* v. *Sinderman,* 498 U.S. 593 (1972) *with Civil Service Commission* v. *Letter Carriers,* 413 U.S. 48 (1974). *Buckley,* of course, directly held that no such compelling governmental interest justifies expenditure limits. See pp. 9, 11-12, *supra.*

Even facially neutral limitations on political speech rarely impact with equal effect. Appellants claim that the FECA's expenditure limitations discriminate in favor of incumbents and against challengers. The Three-Judge Court concluded that "[t]o require that public financing *equalize* these differences would distort its purpose. . . . [A] public campaign funding law should not be required to remedy pre-existing inequalities between candidates." Opinion, pp. 13-14; 58a. (Emphasis added). The decision both misconstrues the nature of appellants' claim and misapplies existing law.

Appellants have never asserted that the FECA should remedy disparities between candidates, or serve any other "equalization" purpose. Nor have they ever asserted that the rights of an incumbent should be limited in order to reduce the incumbent's relative advantages over most opponents. What the appellants do assert is that it is impermissible to limit the quantum of speech available to a challenger attempting to overcome the inherent advantages of an incumbent. Rather than asserting that the FECA must equalize, appellants simply contend that in light of the unavoidable advantages given to incumbents, Congress may not further disadvantage challengers by limiting the amount of their political speech.

Moreover, the Three-Judge District Court's decision that the statutes are "neutral on their face" cannot be reconciled with its finding that incumbent presidents have provided to them ample resources in the way of office space, speech writers, research and clerical assistants, and travel facilities which must be paid for in full by challengers. *Compare* Opinion, p. 14; 58a *with* Findings of Fact, pp. 26-27; 29a-30a. These advantages are compounded by the ability of incumbent presidents to campaign from the White House, while challengers must "create" campaign events, usually on the road and at great expense, as the daily papers demonstrate. Expenditure limits in such circumstances are comparable to limiting each team in a basketball game to twenty-five shots while giving one of the teams a twenty point headstart. Under the Three-Judge District Court's reasoning, this would be a fair and legitimate contest since one would look only to the facially-neutral twenty-five shot rule and ignore the twenty-point headstart.

The "neutrality" of expenditure limits is best tested by hypothesizing an expenditure limit of zero dollars. In that case an incumbent would be virtually unbeatable. As the limits increase, so does the viability of the challenger. The only way for government to be truly "neutral" is to have no limits.

The Right of Individuals to Engage in Political Activity.

The parties and the Three-Judge Court agree about the impact of the FECA and the Fund Act on the rights of individuals to engage in certain kinds of political activities.

The FECA and the Fund Act prevent publicly-funded candidates from accepting, and individuals from giving, private campaign contributions of any size. Because the statutory definition of contributions includes expenditures in coordination with a campaign, including expenditures to duplicate or distribute campaign literature, 2 U.S.C. § 441a(a)(7)(B)(ii), a vast spectrum of traditional political

activities at the grass roots level cannot occur unless funded by the national campaign committee (from the federal subsidy) or, in the case of certain activities, by a state or local party committee.[10]

The range of citizen activity outlawed is vast. Appellant Cardamone cannot use personal funds, as he has in the past, to rent a U-haul trailer for $250 to transport campaign literature so that he may distribute it on college campuses. Findings of Fact, p. 9 n. 10.[11] An individual owning an empty storefront with a rental value of $100 may not make it available to volunteers working in a presidential campaign. Individuals may not put an extra phone in their house to be used by volunteers in the last week of a campaign or rent a car on election day to be used by volunteers to transport a candidate's supporters to the polls. The purchase of leaflets to advertise a rally, an agreement among a few citizens to each mail ten letters with campaign materials to undecided acquaintances, the rental of chairs for a meeting of campaign volunteers, even the purchase of pads and pencils for phone canvassing are illegal under the challenged statutes.[12]

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[10] State or local committees may purchase campaign materials for use by volunteers, 2 U.S.C. § 431(8)(B)(ix), and may conduct voter registration and get-out-the-vote drives, 2 U.S.C. § 431(8)(B)(xi). In either case, costs must be paid from contributions which are made to party committees within limits established by the FECA and which are not designated for use on behalf of a particular campaign. An individual cannot, therefore, finance his or her personal activities in a particular campaign by utilizing a party committee as a conduit.

[11] Because it involves the dissemination of literature produced by the campaign, such an expenditure is treated as both a contribution to, and an expenditure by, the campaign. 2 U.S.C. § 441a(a)(7)(B)(ii).

[12] These examples are taken from Plaintiff's Brief below at pp. 24-25. Neither appellees nor the Three-Judge Court disagreed as to the illegality of the activities suggested in the examples.

The record, based on testimony from both Republican and Democratic officials from the Ford and Carter campaigns, respectively, demonstrates that the challenged provisions of the FECA virtually eliminated the financial basis for grass roots activity in the 1976 presidential election. Prior to the FECA, grass roots activity was financed largely by volunteers with the advice and counsel of a coordinator from the national campaign. Siegel Dep., pp. 7-11; O'Connell Dep., pp. 16-23; Barbour Dep., pp. 44-47. Generally, such volunteers would raise funds as well as contributions in kind, such as storefront office space, furniture, office equipment or payments for utilities. These would support a headquarters from which volunteer political activity coordinated with the candidate's campaign could be conducted. Barbour Dep., pp. 44-47; O'Connell Dep., pp. 17-18. Fundraising was generally accomplished by soliciting door-to-door, by hosting "coffees" at the homes of volunteers, and by sponsoring events such as art auctions and entertainment. Siegel Dep., pp. 10-11; O'Connell Dep., pp. 17-18. Funds raised at the grass roots level were used to engage in canvassing, get-out-the-vote drives and locally-generated campaign advertising. Barbour Dep., pp. 52-57; O'Connell Dep., pp. 19-22. Because all such fundraising is now illegal, the activities it generated cannot take place.

As a result of the FECA, local activity in both parties at the grass roots level during the 1976 presidential campaign was virtually nonexistent. Siegel Dep., pp. 24-26, 26-27, 31-32 and 35-37; O'Connell Dep., pp. 26-27, 48, 49, 50-51, 55-56, 91-92, 104-106; Black Dep., pp. 34-35, 67, 69; Barbour Dep., pp. 30-33; and Cardamone Dep., pp. 36-37. Volunteers, in fact, were actually turned away. Findings of Fact, pp. 15-16; 18a; O'Connell Dep., p. 59.

As the Three-Judge Court found, prior campaigns had funded local activities from the "top down"—the money

coming from the national campaign committee or state and local parties—and from the "bottom up"—individuals funding activities in their own community. Findings of Fact, pp. 11-12; 14a-15a. The effect of the legislation in question has been to outlaw "bottom up" funding with a "dramatic" effect on grass roots activities in both major parties in the 1976 election. Findings of Fact, p. 13; 16a. The Court also concluded as a fact that:

> . . . the record demonstrates that the amount of citizen participation in the 1976 election, where the candidates opted for the statutory expenditure limitation mandated for public financing, was less than in the previous presidential campaign, where the parties through private financing raised funds substantially in excess of the limitation. . . . The effect of the statutes upon individual supporters who wished to make coordinated expenditures on behalf of candidates, however, is far more certain. By prohibiting these individuals from making all such expenditures, the challenged statutes clearly curtailed funding of grass roots activities from the "bottom up."

Findings of Fact, pp. 19-20; 23a.

The record thus demonstrates that before 1976 there have traditionally been two presidential campaign budgets: one at the national level and a second raised and expended by individuals at the local level. Cardamone Dep., pp. 19-21; Barbour Dep., pp. 18-26, 27-37, 40-48, 58-59; O'Connell Dep., pp. 16-23, 34-36, 50-51, 54-56, 91-92, 104-106; Black Dep., pp. 38-40, 63-66; Siegel Dep., pp. 24-26, 26-27, 31-32, 35-37. This second budget has received little attention in the media but has been critical to the grass roots political process as we know it. Under the Fund Act and the FECA, legal restraints are placed upon the coexistence

of these previously self-sustaining budgets, for the candidate must either: (1) accept the limited but certain public subsidy for the national budget, thereby forbidding supporters from supporting any local campaign activity, or (2) forego the public subsidy and its attendant restrictions, thereby risking impairment of the national campaign effort. The individual citizens whose First Amendment rights may be bartered away have no say in this decision.

American citizens are thus prevented from engaging in the most humble kinds of political activities unless someone else both agrees to the activity and funds it.[13] At stake are the rights both of those who make the expenditures and those who participate in the activities funded. This severe limitation on the individual freedom to engage in demonstrably worthwhile political advocacy necessarily raises issues at the core of the First Amendment. It is, moreover, a case of first impression since the impact of expenditure limits on individual rights has never been considered in previous cases.[14]

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[13] National campaign and state and local party committees cannot be counted on to fund even the local activities they are permitted to support. Each has its own priorities for the limited funds available. For example, in 1976, the two publicly funded national campaign committees "emphasized television and other mass media over local field activity." Findings of Fact, p. 12; 15a. In a given election, many state and local party committees do not enthusiastically support the presidential candidate. Individuals seeking to work in a presidential campaign in a local community, moreover, may not be on good terms with party officials. State and local committees ordinarily do not have substantial excess funds and always have great demands from local or statewide candidates for the available funds.

[14] Footnote 65 of *Buckley* cannot foreclose appellants' claim as to the deprivation of individual rights at the grass roots level. That footnote analogized a candidate's voluntarily limiting individual contributions to $100 to the acceptance of federal funding under the Fund Act. The campaigns which have declined direct contributions above a certain amount have never attempted to prevent

The Three-Judge Court sweepingly ruled that Congress has virtually unlimited power to prohibit the individual expenditures necessary to carry out the kinds of grass roots activities described above. Opinion, pp. 8-12; 52a-57a. The principal authority cited, *United States* v. *O'Brien*, 391 U.S. 367 (1968), has been specifically and emphatically rejected by this Court as a precedent sustaining the regulation of campaign contributions and expenditures as "conduct" rather than "speech." *Buckley* v. *Valeo, supra,* at 16-17.

The Three-Judge Court also referred briefly to portions of the opinion in *Buckley, supra,* to support the proposition that such personal expenditures are merely "symbolic expressions of support" and unworthy of First Amendment protection. Opinion, p. 11; 56a. The portion of the *Buckley* opinion cited, when read in its entirety, however, supports the contrary proposition.[15]

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coordinated expenditures to support grass roots activity of the kind described above. In fact, such campaigns typically emphasize individual participation as a tactic to attract votes. Nothing in *Buckley* even remotely suggests that the impact of the FECA's expenditure limits on individuals was considered by this Court.

[15] A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

* * *

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one

The distinction made by this Court was between a governmental interest in regulating the size of contributions a candidate might receive from a single source and the First Amendment's basic protection of the citizen's right to engage in direct political activity. Expenditures from personal funds to support local grass roots activities almost invariably involve political activity and speech by individual donors and persons acting directly in concert with them. Findings of Fact, pp. 9-10, 11-12; 12a-13a, 14a-15a; Cardamone Dep., pp. 14-17, 36, 39-40; Schmid Dep., pp. 16-21, 27-30, 39; Brock Dep., p. 22; O'Connell Dep. pp. 16-22; Barbour Dep., pp. 36, 39-41, 44-46. As such they are anything but "symbolic expressions of support," and are at the core of the First Amendment.

The Three-Judge Court made no attempt to reconcile its approval of such plenary governmental power over individual political expression with other decisions of this

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person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

424 U.S. at 19-21.

Court, such as *Cohen* v. *California,* 493 U.S. 15 (1971), and *Street* v. *New York,* 394 U.S. 576 (1969). Under the rationale of the Three-Judge Court, payment for stenciling on a jacket to advertise a campaign rally would be illegal, while the vulgar slogan on Cohen's jacket is constitutionally protected. The political activities outlawed by the FECA and the Fund Act are in the mainstream of the American political process. Cases such as *Cohen* and *Street* have been thought justified on the grounds that if the First Amendment does not protect political expression at the fringe, the mainstream itself will be endangered. The decision of the Three-Judge Court inverts that proposition and permits wholesale regulation of the mainstream while protecting only the fringe.

The Three-Judge Court also implied that the restrictions on individual activity were insignificant because a "wide range" of other activities are still legal, principally volunteer efforts involving no expenditures, expenditures involving food, residential property and travel up to $1,000, and expenditures for activities wholly independent of a campaign. 2 U.S.C. §§ 431(8)(B)(i)-(iv), 431(17). The factual findings of the Three-Judge Court itself contradict this proposition. The impact of the laws on individual activity was "dramatic," Findings of Fact, p. 13; 16a, and such activity was significantly reduced in 1976 from prior campaigns. Findings of Fact, pp. 12-20; 15a-24a. This was largely because "bottom up" funding was outlawed in 1976, Findings of Fact, p. 20; 23a, and because supporters did not value independent expenditures as highly as work with a campaign. O'Connell Dep., p. 96; Siegel Dep., p. 36; Cardamone Dep., pp. 34-36, 39-40, 42; Schmid Dep., pp. 16-19, 28-29, 31-33. Indeed, the Three-Judge Court explicitly found that "notwithstanding the opportunity to volunteer one's services without compensation and to make independent expenditures, 'grass roots' activity was less intense in the 1976 presidential campaign. . . ." Findings of Fact, p. 18; 21a.

The Three-Judge Court's view that government may pick and choose among methods of political communication and prohibit as it pleases is based on no authority established by this Court. In *Mills* v. *Alabama,* 384 U.S. 214 (1966), a statute prohibiting last minute editorial attacks on candidates so as to permit a timely response was not saved because editorial writers had more than ample time for such attacks in the days and weeks before the election. Further, in *Cohen, supra,* and *Street, supra,* the principal argument for prohibiting the particular acts was that the defendants had chosen particularly profane or offensive forms of protest from a vast range of alternatives. Nevertheless, this Court upheld the First Amendment claims.

The Three-Judge Court also assumed that "coordination" entails dangers to a healthy political process. Opinion, p. 12; 56a. A bolder assault on freedom of association is difficult to imagine. Surely, the urge to be part of the nation's most important political campaign is not subversive, but an inclination to be sustained and nourished. If the decision to coordinate one's efforts with a campaign of a presidential candidate is not protected by the First Amendment, it is difficult to perceive what conduct is sufficiently central to our political system to be entitled to such protection.

Finally, the Three-Judge Court held that individuals barred from engaging in political activities by the FECA and the Fund Act should complain to the candidate who accepted public financing and exercised "the basic right of any person to accept or reject campaign contributions," rather than to the courts. Opinion, p. 11; 55a.

This view of the statutes' impact raises profound First Amendment issues. The record is comprised of extensive testimony by officials of both the Carter and Ford campaigns, including some who found it their regretful obligation to forbid individuals from spending even modest amounts on campaign activities during 1976. Siegel Dep., pp. 31-32; Barbour Dep., pp. 36-37, 52-59; O'Connell Dep., pp. 52-53, 91-92, 104-106. It demonstrates that neither President Ford nor President Carter, nor campaign officials acting on their behalf, wanted to limit grass roots activity. In order to obtain federal "top down" financing, however, they had to agree to conditions which eliminated "bottom up" funding of local activities. The reason for the national campaigns' failure to support local activities more extensively was in the case of each campaign twofold: (1) the amount available under the Fund Act and (2) the priorities of the national campaign. Findings of Fact, pp. 12-18, 19-20; 15a-24a.

Even in the more lavishly-financed campaigns of the past, "bottom up" financing had been essential to the support of local grass roots activities.[16] National campaign committees (and local party committees as well) necessarily have priorities, needs and viewpoints of their own, which inevitably leave vast numbers of local supporters to fend for themselves. Black Dep., pp. 38-40, 63-66; O'Connell Dep., pp. 26-27, 32, 34. These priorities and points of view did not change, of course, with the advent of contribution limits and public financing. Instead, they continued to influence the distribution of the even smaller amount of funds available at the national level, with the great bulk going to television, mass media and the activ-

[16] Appellant Cardamone's rental of a U-Haul trailer to carry campaign literature occurred during the 1972 Nixon campaign, the most heavily financed in history.

ities of the national campaign committee. Black Dep., pp. 38-40, 63-66; Siegel Dep., pp. 35-37; O'Connell Dep., pp. 26-27, 32, 34. What changed was that in order to obtain public funding for its own activities, the national campaign had to agree to the outlawing of "bottom up" financing, thereby eliminating individual citizens' rights to engage in meaningful political activity.

These draconian limitations on political activity are not applied across the board, however, for some organizations are carved out for special treatment. The FECA exempts from the statutory definition of "contribution" and "expenditure" partisan communications between a union and its members and their families and communications between a corporation and its shareholders and executive and administrative personnel and their families. 2 U.S.C. §§ 441b (b)(2)(A), 431(8)(b)(vi) and 431(9)(B)(iii) and (v). The effect of this exemption is to permit unlimited quantities of money to be expended in the presidential general election by certain organizations singled out for special treatment, while candidates and their individual supporters who are not allied with the special class must operate under the severe statutory constraints.

The Three-Judge Court dismissed appellants' claim that Congress' singling out of certain groups, such as labor, violates the First Amendment and the Due Process Clause of the Fifth Amendment. It argued that "the statute permits corporations to engage in the same communication with their stockholders, executive and administrative personnel" and thus is "even-handed and entirely neutral on [its] face." Opinion, p. 16; 60a.

With all due respect, the Court's statement misses the point. It is no answer to political candidates and individual citizens who claim they have been deprived of their

right to political expression that *two*, rather than *one*, specially-privileged groups have been granted the very rights they have been denied. The record shows that grass roots activities such as leafletting, voter registration and get-out-the-vote drives among geographically-concentrated union members are heavily financed by labor organizations. AFL-CIO Stipulation, Appendix A; IAM Stipulation, pp. 8-13, Appendices A-D; UAW Stipulation, pp. 4-5.[17] That corporations also have rights under the FECA to communicate with administrative personnel and shareholders hardly eliminates the discrimination against individual citizens who are allowed no expenditures for the very same kind of grass roots activity.[18]

The Three-Judge Court's decision is inconsistent with prior decisions of this Court. In *Police Department* v. *Mosley*, 408 U.S. 92 (1972), this Court invalidated an ordinance which forbid all picketing of schools except by labor organizations as an unconstitutional regulation of the content of speech. It stated:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be

[17] "Internal communications" in the 1976 election by the AFL-CIO, the International Association of Machinists and the United Auto Workers alone amounted to $4.45 million, or roughly 20% of the amount a major party presidential candidate was allowed to spend. There are over 100 other national labor organizations.

[18] The record shows that such activities by corporations in 1976 were *de minimus*. Black Dep., pp. 45-46.

> heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

408 U.S. at 96 (footnote omitted).

The imposition of expenditure limits on all presidential candidates accepting public financing and the prohibition on their supporters on making even the most minimal coordinated expenditure, while leaving candidates supported by Section 441b organizations free to communicate without limit, works precisely the same discriminatory result this Court struck down in *Mosley*.

The Right to Make Political Contributions. In upholding the statutory prohibition on "coordinated expenditures" as a function of the prohibition on contributions directly to a campaign, the Three-Judge District Court *a fortiori* held that Congress has the power to ban all private contributions to campaigns, no matter how small. A total ban on private contributions raises a substantial constitutional issue. *Buckley* held only that Congress may limit the size of contributions to a campaign in the interest of preventing corruption or the appearance of corruption. 424 U.S. at pp. 17-33. It did not hold, or even suggest, that all private contributions, no matter how small, may be absolutely prohibited. To the contrary, it quoted with approval the statement of Judge Tamm in the court below:

> "If a Senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none."

424 U.S. at 56 n.64.

A contribution to a major party presidential candidate of under $1,000—in fact contributions to presidential candidates in 1976 averaged well under $100—cannot conceivably corrupt or appear to corrupt a candidate who begins with a federal campaign fund in excess of $29,000,000.

That avoiding corruption or the appearance of corruption is not the purpose of these restrictions is underlined by the fact that candidates may legally raise contributions to make up a deficiency in the Presidential Election Campaign Fund. 26 U.S.C. § 9004. If contributions neither corrupt nor appear to corrupt in those circumstances, they are even more innocuous when the full subsidy is available.

Clearly the statutory ban on contributions of any size has another purpose, that of limiting expenditures. But that is not a constitutionally permissible purpose. See pp. 9-12, *supra*. Contributions to a candidate which enable that candidate to engage in political communication with voters are themselves a form of political speech. Not only do they enhance the candidate's ability to communicase with voters but they also permit hundreds of thousands of small donors to participate in the political process in a way which is, for many, their only alternative. While Congress may regulate large contributions in the name of avoiding corruption or the appearance of corruption, prohibiting all contributions solely to limit a candidate's expenditures deprives that prohibition of a valid constitutional basis.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted, and the case set for briefing and argument on an expedited basis.

Respectfully submitted,

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Dated: March 7, 1980

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2783

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

JUDGMENT

A three-judge District Court having been convened herein by order entered pursuant to 28 U.S.C. § 2284 on November 30, 1978, in accordance with § 801(b) of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9011(b); and defendants having thereafter on February 20, 1979 renewed their motion to dismiss this action; and the three-judge District Court, on October 15, 1979, after hearing the parties and accepting submissions of evidence, having filed Joint Findings of Fact; and the parties thereafter having submitted briefs on the renewed dismissal motion; and the three-judge District Court having issued an opinion, dated February 5, 1980, concluding that the complaint must be dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.;* it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' said renewed motion to dismiss this action is granted and the

Appendix A

complaint herein is dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.*

Dated: New York, New York
February 13, 1980

/s/ RAYMOND F. BURGHARDT
Clerk

ORDERED, ADJUDGED AND DECREED that defendants' said renewed motion to dismiss this action is granted and the complaint herein is dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.*

Dated: New York, New York
February , 1980

/s/ WALTER R. MANSFIELD
Walter R. Mansfield, *U.S.C.J.*

/s/ ELLSWORTH A. VANGRAAFEILAND
Ellsworth A. Vangraafeiland, *U.S.C.J.*

/s/ LEE P. GAGLIARDI
Lee P. Gagliardi, *U.S.D.J.*

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2783

REPUBLICAN NATIONAL COMMITTEE, et al.,
Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION,
Defendants.

JOINT FINDINGS
OF FACT

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Appendix B

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Appendix B

Joint Findings of Fact of the District Court Pursuant to the Federal Election Campaign Act of 1971, as Amended, 2 U.S.C. §431, *et seq.*, and of the Three-Judge Statutory Court Convened Pursuant to the Presidential Election Campaign Fund Act, Ch. 95, Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §9001, *et seq.*

GAGLIARDI, *D.J.*

This is an action for declaratory and injunctive relief against the enforcement of certain provisions of the Presidential Election Campaign Fund Act, Chapter 95 of Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§9001 *et seq.* ("Fund Act") and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§431 *et seq.* ("FECA"). Plaintiffs, Republican National Committee ("RNC"), The Ripon Society of New York, Inc., Paul A. Cardamone and John A. Schmid, challenge the constitutionality of both of these federal election laws on First, Fifth and Ninth Amendment grounds. The defendants are the Federal Election Commission ("FEC") and its members, the Attorney-General, and the Secretary of the Treasury.[1] Jurisdiction is asserted under 28 U.S.C. §§1331, 2201 and 2202, §314a of FECA, 2 U.S.C. §437h, and §801(b) of the Fund Act, 26 U.S.C. §9011(b).

Section 801(b) of the Fund Act, 26 U.S.C. §9011(b), authorizes the national committee of any political party and any individual eligible to vote for President to institute such actions for declaratory judgment and injunctive re-

[1] Common Cause, a public interest organization, and two of its officers have been granted leave to participate as *amici curiae*.

lief as may be appropriate to "implement or construe" any provision of the Fund Act, and further provides that such a proceeding, over which the district court is expressly granted jurisdiction, shall be heard and determined by a three-judge district court pursuant to 28 U.S.C. §2284.[2]

Section 314a of FECA, 2 U.S.C. §437h(a), similarly authorizes a national committee and any individual eligible to vote for President to bring an action in the district court for a declaratory judgment "to construe the constitutionality of any provision of the Act" and mandates the single-judge district court immediately to certify "all questions of constitutionality of this Act to the United States court of appeal for the circuit involved, which shall hear the matter sitting en banc." [3]

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[2] 26 U.S.C. §9011(b) provides:

(b) *Suits to implement chapter.*—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

[3] 2 U.S.C. §437h(a) provides:

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Due to the aforementioned statutory scheme, the province of the three-judge court is limited to passing on issues related to the implementation and construction of provisions of the Fund Act while the province of the single judge is limited to certifying questions of constitutionality of FECA and taking whatever steps are necessary to effectuate such certification.

On November 30, 1978, this court, functioning as a single-judge court (Gagliardi, *J.*), noted the procedural ambiguities raised by the special review provisions of these two statutes and declined to decide the defendants' motion to dismiss at that time. The single-judge court, however, (1) granted plaintiffs' motion to convene a three-judge court pursuant to Subtitle H, 26 U.S.C. §9011(b), to decide the constitutional issues raised with respect to certain provisions of the Fund Act and (2) stated that the single-judge court would entertain a motion to certify questions regarding the constitutionality of FECA to the en banc Court of Appeals pursuant to 2 U.S.C. §437h. 461 F. Supp. 570 (1978).

Defendants thereupon renewed their motion to dismiss the complaint before the three-judge court. At the oral argument of this motion on May 8, 1979, the single-judge and three-judge court both recognized that the constitutional issues asserted with respect to both statutes (the Fund Act and FECA) were similar, and that plaintiffs directed most of their claims against provisions of the

Fund Act which impose certain conditions on eligibility for public funding. *See* 26 U.S.C. §9003. In an effort to comply with the mandates of both statutes, requiring decisions on constitutional issues be expedited, both district courts directed the parties to submit their evidence, proposed findings of fact and questions regarding the constitutionality of both Acts,[4] so that both courts simultaneously could make findings of fact with a view towards a simultaneous decision by the Court of Appeals and the three-judge district court of the constitutional issues. This procedure followed that which was adopted in *Buckley* v. *Valeo,* 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part and rev'd in part,* 424 U.S. 1 (1976), the only variation being that the district courts would make their findings before, rather than after, a remand by the Court of Appeals.[5]

I. *The Challenged Statutes*

The statutory scheme challenged by the plaintiffs is found in both the Fund Act, 26 U.S.C. §§9001-13 and the FECA, 2 U.S.C. §§431-55. The Fund Act, 28 U.S.C. §9006, creates an optional public funding plan for presidential general election campaigns. 26 U.S.C. §9004 provides that each

[4] No live testimony has been offered. The record consists of deposition transcripts and documentary evidence submitted by both sides.

[5] As detailed at length in the single-judge court's decision of November 30, 1978, the District of Columbia Circuit has evolved a procedure in cases involving the constitutionality of both the FECA and the Fund Act whereby a single judge makes findings of fact and certifies constitutional issues pursuant to the FECA and the three-judge court and *en banc* Court of Appeals sit concurrently to decide questions of constitutionality of the Fund Act and the FECA respectively.

eligible major party presidential candidate[6] may at his option receive an amount not exceeding the campaign expenditure limitations set forth in the FECA, i.e., $20 million as adjusted for increases in the cost of living. 2 U.S.C. §441a(b)(1)(B), (c). To be eligible to receive payments from the "Presidential Election Campaign Fund",[7] however, §9003(b) requires the major party presidential candidate to certify that he will not incur campaign expenses in excess of the FECA limitations and that he has not and will not accept any private contributions.[8] The FECA defines "contributions" to include "coordinated" or "non-independent" expenditures, *e.g.,* "expenditures made by any person in cooperation, consultation, or concert, with, or at the request of a candidate, his authorized political committee, or their agents." 2 U.S.C. §441a(a)(7)(B). Thus, when a candidate accepts public funding, he must generally forsake private funding. With the exception of small amounts spent hosting social affairs in one's home or travelling while vol-

[6] A "major party" is one whose candidate for the office of President in the preceding Presidential election received, as the candidate of such party, 25 percent or more of total of popular votes received by all candidates for such office. 26 U.S.C. §9002(6). The candidate of a "minor party", a political party whose candidate received between 5 and 25 percent of the total popular votes in the preceding Presidential election, *id.* §9002(7), or a "new party", a political party which is neither a major party nor a minor party, may also, at his option, receive public funding. *Id.* §9004(a)(2),(3).

[7] 26 U.S.C. §9006 establishes this fund on the books of the United States Treasury and charges the Secretary of the Treasury with transferring monies to the fund not in excess of the amounts designated by federal taxpayers pursuant to a tax-checkoff mechanism set forth in 26 U.S.C. §6096.

[8] Private contributions are permitted if there are insufficient monies in the Presidential Election Campaign Fund to permit full funding of all candidates.

unteering personal services to the candidate, 2 U.S.C. §431 (f)(D), (E), individuals who support a publicly funded candidate are barred from contributing to his campaign or from making expenditures in cooperation with the campaign.[9] The statutes, however, do not prohibit supporters from making independent expenditures without consultation with the campaign, 2 U.S.C. §441a(a)(7)(B), or from volunteering their services to the campaign without compensation. *Id.* §431(e)(5)(A).

If a major party candidate rejects public funding, he is permitted, of course, to raise as much money as he can and spend all he can raise from private sources. The FECA, however, limits the size of contributions that a person may make to a candidate and his authorized political committee ($1,000), to a political committee established by a national political party ($20,000), or to any other political committee ($5,000) in any calendar year. 2 U.S.C. §441a(a)(1).

II. *Plaintiffs' Claims*

The plaintiffs in this action are the national committee of the Republican Party, a New York corporation whose members are politically active registered Republicans, and two individual residents of New York State who are politically active, registered Republicans. Plaintiffs challenge the Fund Act's requirement that a major party presidential candidate certify, as a condition of eligibility for public financing, that he will not raise or spend private funds and

[9] The national committee of a political party, however, may incur expenses on behalf of its presidential candidate, even if he accepts public funding, "in an amount equal to 2 cents multiplied by the voting age population of the United States." 2 U.S.C. §441a(d). In 1976, the national party committees were each permitted to spend $3,203,786.96 on behalf of their presidential candidates' campaign. (Defendants' Exhibit M, at 4).

the FECA's direct prohibition against such expenditures. Plaintiffs' goal is to enable the 1980 Republican presidential candidate to raise and spend both public and private funds and to permit his supporters to make coordinated expenditures on his behalf.

The complaint sets forth six causes of action. First, plaintiffs contend that the statutory scheme violates the First Amendment in that it conditions eligibility for federal campaign funds upon compliance with unconstitutional expenditure limitations and thereby restricts the ability of candidates who opt for public funding, and their parties' supporters and potential contributors, to communicate their political ideas. Second, plaintiffs allege that the statutes violate the First Amendment because the Republican presidential candidate in 1980 must, as a result of certain "legal and practical factors," accept public funding and agree to comply with the unconstitutional expenditure limitations. For their third and fourth causes of action, respectively, plaintiffs claim that the statutes discriminate against presidential candidates challenging incumbent Presidents and against candidates who lack support among labor organizations in violation of the First and Fifth Amendments. Finally, for their fifth and sixth claims, plaintiffs assert that the statutes are both unconstitutionally overbroad and in violation of their retained rights under the Ninth Amendment.

Plaintiffs have tendered evidence relating to each of their first four causes of action. Thus, plaintiffs have attempted to show that: A. the challenged statutes abridged political expression in the 1976 presidential campaign (first and second causes of action); B. the Republican presidential candidate will, as a practical matter, be required to accept public funding in 1980 (second cause of action); C. the

statutes discriminate against presidential candidates who run as challengers against incumbent Presidents (third cause of action); and D. the statutes discriminate against presidential candidates without substantial labor union support (fourth cause of action). Each of these basic factual contentions will be reviewed *seriatim.*

III. *Findings of Fact*

The following constitutes the joint findings of fact pursuant to Rule 52(a), Fed. R. Civ. P. of the single-judge and three-judge courts.

A. *The Statutory Impact Upon Public Participation in the 1976 Presidential Campaign*

1. *The Parties*

Plaintiffs contend that the challenged statutes decreased citizen participation in the 1976 publicly financed presidential election campaign below what it would have been had the campaign been privately financed, and that they will inevitably do so again in 1980. Plaintiff Cardamone, a politically active Republican, has made small contributions and coordinated expenditures in Presidential campaigns prior to 1976 and wishes to do so again.[10] Similarly, plaintiff Schmid, Chairman of the Board of plaintiff Ripon Society of New York, Inc., has made personal expenditures

[10] Thus, Cardamone testified, for example, that in 1972, he personally rented a U-Haul trailer for $250, filled it with Nixon for President brochures printed at the expense of the New York State Committee to Re-Elect the President, and distributed the brochures to students at upstate New York college campuses. (Cardamone Dep. 14-17). Cardamone stated that he would like to use his own funds for republication of the Republican candidate's campaign literature in 1980. (*Id.* at 36).

on behalf of candidates in New York State campaigns and testified that both he and members of his organization would like to make small contributions and coordinated expenditures on behalf of the 1980 Republican candidate (Schmid Dep. at 27-30, 39). Plaintiff Republican National Committee, the official leadership body of the Republican party, has authorized the commencement of this suit for the purpose of restoring the right of members, adherents and supporters of the Republican Party to support the 1980 presidential candidate through local organizational activities that will involve the expenditure of funds in coordination with the candidate's campaign. (Deposition of William E. Brock, III, at 22).[11]

The 1976 presidential campaign was the first to be subject to the contribution and expenditure provisions of the FECA and the Fund Act. Assessing the impact of these statutes upon citizen participation in the 1976 campaign and its potential impact upon future elections is a difficult task, for it requires both a comparison between the role "that grass roots" activities have traditionally played in presidential elections and their role in the 1976 campaign, as well as an attempt to isolate the effect of the statutes' operation from a myriad of other factors that influence public participation in the political process.

[11] Only two of the major candidates for the Republican presidential nomination have made a final decision whether to accept public funding for the general election campaign should they win the nomination. John B. Anderson and George Bush have decided to accept public funding; Mr. Bush has done so believing that he has no practical alternative. (Defendants' Exhibits O, Q). Howard Baker, John Connally, Robert Dole and Ronald Reagan remain undecided (Defendants' Exs. P, R, S, T). It is unclear from the record whether former President Ford would opt for public funding.

Appendix B

2. *Defining "Grass Roots"*

The term "grass roots", as it has been used by the parties and several of the witnesses, embraces a wide variety of political activities engaged in by individual citizens in support of the candidate of their choice. Among the many activities identified in the record as being encompassed within the term "grass roots" are door-to-door canvassing, distributing printed campaign material (e.g., brochures, bumper stickers, buttons and yard signs), organizing political rallies, manning telephone banks, operating storefront headquarters, recruiting campaign volunteers, participating in voter registration and get-out-the-vote drives, organizing speakers' bureaus, erecting campaign billboards, designing and placing newspaper advertisements, and drafting position papers for candidates on local issues. (Deposition of Paul C. Cardamone, at 10-20; Schmid Dep. at 12-20; Deposition of Haley R. Barbour at 69; Deposition of Charles R. Black, Jr. at 67, 70; Brock Dep. at 16-17).

Some "grass roots" activities require the individual citizen to contribute only his time and effort; the individual, as opposed to the candidate or his campaign committee, incurs no out-of-pocket cost for engaging in these political activities (*e.g.*, distribution by hand of brochures printed at the expense of the candidate's national campaign committee). Other forms of "grass roots" participation, however, obviously involve the expenditure of the individual's own funds on behalf of the candidate of his choice (*e.g.*, placing a newspaper advertisement). Thus, prior to 1976, "grass roots" activities were traditionally funded both from the "top down" (*i.e.*, expenditures by the candidate's national campaign committee or by national, state or local political parties on behalf of the candidate) or from the "bottom up"

Appendix B

(*i.e.*, expenditures by individual supporters). The funds to operate a local storefront headquarters, for example, might have been provided either by the candidate's national campaign committee or by local supporters who "passed the hat" at a political rally. (Barbour Dep., at 39-41; Deposition of Terrence M. O'Connell, II at 17-20).

The statutory limitations on expenditures by, and the prohibition on contributions to, presidential election campaigns altered the manner in which grass roots activities were financed in 1976. The factual issues to be resolved are whether grass roots activities were diminished in 1976 in comparison to prior presidential elections and, if so, the extent to which the decreased activity may be attributed to the operation of the challenged statutes.

3. Grass Roots in 1976—
Assessing the Statutory Impact

Plaintiffs have adduced substantial evidence showing that grass roots participation in the 1976 presidential campaign was low by comparison to prior presidential campaigns. High-level operatives from both the Carter and Ford campaigns testified to the pronounced lack of visibility of the campaigns at the local level and attributed the lack of local storefronts and bumper stickers to the fact that the two campaigns adopted similar budgetary priorities. In allocating the $22 million in public funds to the various campaign needs, both the Carter and Ford national committees emphasized television and other mass media over local field activity. (Barbour Dep. at 21-24; O'Connell Dep. at 26-31; Deposition of Mark A. Siegel at 35-37). As plaintiffs' witness Terrence O'Connell, the California coordinator of the Carter-Mondale campaign, testified about the Carter budgetary strategy:

Appendix B

> We said the first thing to cut out is buttons and bumper stickers; people don't use them and don't look at them. They should be the first thing to go.

(O'Connell Dep. at 31-32). The Executive Director of the Democratic National Committee in 1976 stated that Carter's staff believed that use of mass media "was the most direct way to influence political participation." (Siegel Dep. at 36). Sharing the belief that mass media are the "most cost effective way" to influence public opinion, the Ford campaign developed the same budgetary priorities. (Deposition of Douglas L. Bailey, at 34). *See also* Brock Dep. at 21, 39. As plaintiffs' witness Haley Barbour, Regional Director for the Ford campaign in the Deep South, described the decision to emphasize mass media:

> [Y]ou have [only] so much money for carrying the message and the most effective way for these kind of bucks was in advertising, in media, in direct mail, reach the most people with the most targeted message. . . .

The impact of these budgetary policies upon various forms of grass roots activities was dramatic. Plaintiffs' witness Barbour testified that the Ford campaign's allocation for each Deep South state ranged from $10,000 for Arkansas to $20,000-$30,000 for Florida. (Dep. at 21). Campaign materials such as bumper stickers, brochures, and yard signs were in very short supply in the region in 1976 by comparison to recent Mississippi gubernatorial and United States Senatorial campaigns in which Barbour had been actively involved. (Barbour Dep., at 30-32, 38). Virtually every day of the campaign, individuals complained to Barbour about the absence of campaign materials (*Id.* at 30-31). Because of the short supply of these materials, traditional volunteer activity such as bumper sticker "blitzes", yard sign programs and leafleting of factories and shopping centers did not take place. (*Id.* at 32). Similarly, no county or local storefront headquarters were set up by the Ford national committee in the Deep South. (*Id.* at 39).[12] The testimony of plaintiff Paul Cardamone (Cardamone Dep. at 37), plaintiff's witness Charles Black, political assistant to Republican Vice Presidential candidate Robert Dole (Black Dep. at 35, 69-70) and Republican National Chairman William E. Brock III (Dep. at 19-21) suggests that the Ford campaign's lack of emphasis upon grass roots activities was not unique to the Deep South.[13]

Appendix B

Despite the populist tenor of the Carter campaign, it, too, suffered from a "lack of visibility" at the grass-roots level. The campaign was "top heavy" in that there was very little volunteer work, get-out-the-vote drives, or other local activity (Siegel Dep. at 36). Plaintiffs' witness Siegel served as the liaison between the Carter campaign and the state Democratic parties and was in continual phone contact with state and local party organizations. (Siegel Dep. at 4, 23-24). These local organizations frequently complained to Siegel about the lack of printed campaign materials. (*Id.* at 24). The biggest gripes came from states which were "untargeted", *i.e.*, those which the Carter staff determined

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[12] The Republican National Committee did finance the operation of a small number of phone banks in the region in coordination with the Ford campaign, as permitted by 2 U.S.C. §441d. (Barbour Dep. at 34). *See* note 9 *supra*. The storefronts in which these phone banks were established, however, were not used for any other sorts of grass roots activity such as the storage and distribution of campaign literature. (Barbour Dep. at 40-41).

[13] Cardamone testified to the absence of a visible Ford campaign in Albany County and the lack of a county campaign headquarters, and Black and Brock testified that there was little local organizational work for Ford throughout the country.

to be either too small to warrant large expenditures or too certain to be won or lost for expenditures of any size to have an impact (*Id.* at 25). But complaints were also registered in "targeted" states, and mistrust developed between the national campaign and the state Democratic parties over the lack of buttons, posters and bumper stickers. (*Id.* at 25-28). Plaintiffs' witness O'Connell contrasted his experience in the 1972 McGovern campaign in Michigan, in which substantial door-to-door canvassing and get-out-the-vote drives were coordinated from 82 storefronts and 20 headquarters located throughout the state with his experience as the Carter campaign coordinator for California in 1976. (O'Connell Dep. at 15-23). O'Connell's budget for field operations in California was $288,000, a sum designed to cover rental of headquarters, salaries for paid field staff, leaflets, equipment rental and a get-out-the-vote campaign. (*Id.* at 35-36). This was substantially larger than the average state field appropriations budget of $50,000-$60,000 (*Id.* at 34). The Carter campaign had only four headquarters in all of California, one each in the state's four largest cities. (*Id.* at 37). In addition, the campaign shared the use of twenty "unified" Democratic headquarters with various local candidates (*Id.* at 90). Additional storefronts were not opened because the campaign did not allocate sufficient money to do so, and coordinated expenditures by supporters for the purpose was not permitted. (*Id.* at 91-92, 105). Little effort was concentrated in rural areas because they were sparsely populated; efforts were concentrated in marginal areas (*Id.* at 43-44). The campaign in California managed to attract many volunteers, but there was little for them to do. (*Id.* at 59). No real canvassing effort was undertaken due to the lack of storefronts from which to conduct such activity. (*Id.* at 55-56). The "lack of

visibility" of the campaign, especially buttons, leaflets and bumper stickers bewildered and alienated local supporters. (*Id.* at 48-49). Because of the limited resources, the California campaign centered on a get-out-the-vote campaign in the last four or five weeks of the campaign. (*Id.* at 57-61).

When supporters of Ford and Carter were told that the candidate's budget did not include allocations for storefronts, brochures, local advertising or other such activity, many of them volunteered to contribute these items to the campaigns. (Barbour Dep. at 36, 46-47, 53-54, 58; O'Connell Dep. at 51, 92-96, 102; Siegel Dep. at 31-32). In the towns of the Deep South, for example, where the local Republican Party rarely maintained storefronts year round, and campaign storefronts were generally financed locally by "passing around the hat" or by borrowing space and furniture, Ford supporters offered to do the same in 1976. (Barbour Dep. at 44-46). Similarly, Carter supporters in California volunteered to contribute storefront headquarters. (O'Connell Dep. at 51). Many of these proposed expenditures were in small amounts (*Id.* at 102). Campaign officials were constrained to reject these offers and to explain to supporters that federal law prohibited such "coordinated expenditures." (Barbour Dep. at 46, 54-56; O'Connell Dep. at 51-53, 92; Siegel Dep. at 31-32). There were instances in which individuals opened Carter storefronts, and campaign officials asked these individuals to close the storefronts for fear that the money expended in such storefronts would be charged against the Carter campaign. (Siegel Dep. at 31-32). The reaction of supporters to the effect of the new law was one of "anger", "disbelief" and "disgust". (Barbour Dep. at 58-59; O'Connell Dep. at 52-53). Some campaign officials would occasionally inform supporters that they had a statutory right to make inde-

Appendix B

pendent expenditures (Siegel Dep. at 62), but others were reluctant to do so and even actively discouraged independent expenditures fearing that the expenditures would be considered to have been "authorized" by the campaign. (Barbour Dep. at 55-57, 74).

There is, of course, some evidence in the record of effective grass roots activity. Citizens desiring to participate in the campaign were able to engage in a variety of activities in coordination with the campaign which did not require the expenditure of their own funds. Thus, defendants' witness Herschel V. Beazley testified concerning his efforts on behalf of Jimmy Carter as a member of the "Peanut Brigade", a group of approximately 50 Georgian volunteers who did door-to-door canvassing and factory leafleting in the State of Iowa. (Beazley Dep., 8-10).[14] Defendants' witness O'Connell testified that there were no fewer volunteers in 1976 than there were in 1972. (O'Connell Dep. at 59). Because the campaigns allocated so little to grass roots activities, however, there were not "as many places for [volunteers] to go or as many things for them to do" as in prior presidential campaigns. (*Id.*) Although some independent expenditures were made by supporters of the candidates (Barbour Dep. at 73-74; O'Connell Dep. at 95), it is nonetheless clear that many of these supporters would have preferred the opportunity to coordinate their expendi-

[14] Since the value of services provided without compensation by individuals who volunteer a portion of their time is not a "contribution", 2 U.S.C. §431(e) (5) (A), the Peanut Brigade's performance of these services did not violate the challenged statutes. The Carter campaign furnished the leaflets and the cost of transportation. The volunteers themselves, however, paid for food and hotels (Beazley Dep. at 12). These small disbursements for food and lodging are exempted from the statutory definition of "expenditure". 2 U.S.C. §431(f), (D), (E).

Appendix B

tures with the campaigns. (O'Connell Dep. at 96; Siegel Dep. at 36; Black Dep. at 36; *see* Cardamone Dep. at 34, 42; Schmid Dep. at 28-29). The record as a whole supports the conclusion that, notwithstanding the opportunity to volunteer one's services without compensation and to make independent expenditures, "grass roots" activity was less intense in the 1976 presidential campaign than it had been in earlier campagns.[15]

Some of the decline in citizen participation in the 1976 campaign, however, may be attributable to factors other than the challenged statutes. Even prior to 1976, presidential campaigns emphasized mass media and television in particular, at the expense of grass roots activities. As RNC Chairman Brock testified:

> Certainly the methodology of politics has changed enormously since the advent of mass communications,

[15] Plaintiffs' evidence on this point stands virtually unrebutted. Defendants seek to introduce into evidence the results of the National Election Studies, a research poll conducted by the Political Behavior Program of the Survey Research Center of the Institute for Social Research and by the Center for Political Studies, both of the University of Michigan. (Defendants' Exhibit B). Plaintiffs' sole objection to the admission of the results of this poll is on the ground of relevance (letter from Plaintiffs' counsel to the court, July 25, 1979). Since Plaintiffs' objection goes more to weight than admissibility, it is overruled and Exhibit B is admitted into evidence. The poll represents an attempt to measure various forms of citizen participation in political campaigns since 1952. The results, however, are apparently not restricted to general election campaigns for President. Most of the questions posed either seek information bearing upon the respondent's interest or participation in the "campaign" or ask whether the respondent engaged in certain activities without reference to any particular election. Thus, the responses compiled in the tables comprising Exhibit B may refer to Senatorial, Congressional state and local elections as well as Presidential elections, and it is difficult to infer anything therefrom with respect to public participation and interest in general election campaigns for President.

> mass media and primarily television. But the change has been because the people took an easy route and became dependent upon television and both parties allowed their root structure to begin to dry up because even without the law that does exist to presidential campaigns, as it does now, there is a finite limit to what a candidate can raise in almost any campaign.

(Brock Dep. at 37-38). Thus, even prior to 1976, campaign workers frequently complained of "a shortage of buttons and bows." (Bailey Dep. at 33). Another factor influencing the level of grass roots participation is the extent to which the candidates' personalities or the issues of the day capture the public's imagination. Thus, defendants' witness Peter D. Hart, an experienced pollster, attributed some of the decline in public participation in the 1976 campaign to the candidates' failure to "energize" the electorate. (Hart Dep. at 12-13, 68; *see also* Brock Dep. at 39-41). The frequently noted public disillusionment with politics after the Watergate crisis may have also played a role. (Hart Dep. at 12, 68). The very newness of the FECA restrictions undoubtedly engendered confusion among campaign officials,[16] who on occasion deterred supporters from making lawful independent expenditures. (Barbour Dep. at 55-57, 74).[17]

[16] The FEC is empowered to render advisory opinions concerning the application of the provisions in the Fund Act. Any person involved in the specific transaction or activity as to which the advisory opinion is requested or in a transaction or activity which is indistinguishable in all material aspects may rely upon the advisory opinions without fear of sanctions. 2 U.S.C. §437f. It is unclear from the record how frequently persons involved in the campaign took advantage of this option.

[17] In addition, neither national party committee expended the full amount permitted under 2 U.S.C. §441a(d). *See* note 9 *supra*. The

In the final analysis, however, the record demonstrates that the amount of citizen participation in the 1976 election, where the candidates opted for the statutory expenditure limitation mandated for public financing, was less than in the previous presidential campaign, where the parties through private financing raised funds substantially in excess of the limitation. Thus, defendants' witness Bailey, the media supervisor to the Ford campaign, testified that if more money had been available to the Ford campaign, more funds would have been allocated to local activities (Bailey Dep. at 35). It is, however, somewhat uncertain whether increasing the amount of funds to be sent by the candidates' national committees would have resulted in the allocation of additional funds to local activities or the allocation of even greater amounts to mass media at the expense of local activities. *See* Hart Dep. at 64. The effect of the statutes upon individual supporters who wished to make coordinated expenditures on behalf of candidates, however, is far more certain. By prohibiting these individuals from making all such expenditures, the challenged statutes clearly curtailed funding of grass roots activities from the "bottom up."[18]

Democratic National Committee spent approximately $2.8 million on behalf of Carter's campaign; the Republican National Committee spent approximately $1.9 million on behalf of the Ford campaign.

[18] It does not necessarily follow, however, that the statutes' curtailment of grass roots activity had any bearing upon the outcome of the election. Plaintiffs' witness Black speculated that local community activities have an impact on elections of roughly 2% to 5% (Black Dep. at 38), but no basis was offered for this figure. Defendants' witness Bailey, a Ford campaign media strategist, testified that more "buttons and bows" would not have influenced the outcome in 1976, and would simply have made local supporters happier. Asked if having more money to spend would have made a difference in the outcome, Bailey responded: "If we couldn't do it with $22 million, we could not have done it with $62 million." (Bailey Dep. at 27).

B. *The Voluntariness of Public Financing*

Plaintiffs, for their second cause of action, allege that presidential candidates must, as a practical matter, accept public financing of their campaigns. Although the Fund Act, as drafted, creates a voluntary system of public financing, plaintiffs contend that the provisions of both the FECA and the Fund Act, and the practicalities of raising contributions under the dollar limits per contributor these statutes impose, effectively compel the candidate to accept public funding.

Plaintiffs' principal evidence in support of this claim is the testimony of Charles R. Black, Jr., presently the Deputy Chairman and Political Director of the Reagan for President Committee and Midwest Coordinator for the Citizens for Reagan Campaign in 1976. (Black Dep., at 3, 11-12). Largely on the basis of his experience in direct-mail fund raising with the Reagan campaigns and elsewhere, Black has concluded that it is not feasible for presidential candidates to forego the public lump sum grant of $20 million, as adjusted for inflation (*Id.* at 16). By Black's calculation, a presidential candidate who rejects public funding would have, depending on when his party's convention was held, between 80 and 120 days to raise private funds. Because time is needed to plan fund raising efforts, Black determined that the actual amount of time available for fund raising is between 60 and 70 days. (*Id.* at 26-27). Black discounted any candidate's ability to raise money for the general election prior to winning the nomination on the ground that a candidate lacks credibility among potential contributors until he is the nominee and a candidate would be reluctant to compete with himself for contributions during the primary season. (*Id.* at 31-32, 79). Moreover, since

fund-raising costs generally equal 20% of the amount raised, the candidate who chooses to reject federal funding would have to raise appreciably more than the amount of the public grant to warrant the effort. (*Id.* at 25).

Though acknowledging the existence of other forms of fund-raising, Black testified that "direct mail" is the most effective technique, albeit an expensive one (*Id.* at 32-33). Direct mail fund-raising involves the use of "prospect" lists of persons likely to be favorable to the candidate seeking support. An acceptable rate of return on an initial mailing is approximately 2%. Thus, to get 100,000 contributions from an initial mailing, a candidate would generally have to mail 5 million letters. (*Id.* at 103-04). The percentage return from subsequent mailings to contributors found on the initial mailing is higher, approximately 8 to 10%. *(Id.)* Thus, it would require an additional 800,000 to 1,000,000 more mailings to get another 100,000 contributions. The cost of printing and mailing one fund-raising letter with first class postage is between 25 and 30 cents. (*Id.* at 105). In the 1976 primary campaign, Reagan raised an average of $48.75 from 185,000 contributors or slightly over $9 million gross, an amount far less than that available from the public fund. (*Id.* at 13-14, 102). Based on this showing, the Reagan campaign determined in the summer of 1976 that if Reagan were to win the nomination, he would accept public funding for the general election. (*Id.* at 15, 76-79). Although Reagan has made no final decision with respect to financing his 1980 campaign, Black testified that Reagan is likely to choose public financing if he wins the nomination. (*Id.* at 24-25).

Black further testified that the use of direct mail techniques would create serious cash flow problems even if an amount appreciably greater than the public fund could

eventually be raised. There is a time lag between the mailing of contribution letters to prospects and the receipt of contributions. Printing and postage for direct mail must generally be paid in advance (*id.* at 30), as well as many campaign services, such as media and travel. (*Id.* at 28-29). Moreover, there is a substantial risk in deciding not to take public funds because the statute does not permit the candidate to reverse his decision and choose public funding once he accepts a private contribution. (*Id.* at 31).

Black's testimony regarding the nature of direct mail and its limitation as a fund-raising technique stands unrebutted. Nevertheless, the court finds that Black's analysis of the *overall* fund raising potential of presidential campaigns rests upon several doubtful assumptions. First, the analysis posits almost total reliance upon direct mail fund raising. As several witnesses testified, there are many other techniques by which a presidential candidate can raise funds. Between 1972 and 1976 for example, the Democratic National Committee organized several national "telethons" in an effort to eliminate the debt incurred in the 1968 presidential campaign. The net proceeds totalled $3.6 million. (Siegel Dep., at 11-15). Other options include personal solicitation, telephone or closed-circuit television solicitation and fund raising events such as dinners, receptions, rallies, concerts and auctions. (Black Dep. at 32; Hart Dep. at 18-21, 51-59; Bailey Dep. at 19; Siegel Dep. at 57). There is no reason why these techniques could not be used effectively in conjunction with a direct mail campaign. Second, the analysis assumes that a candidate cannot begin private fund raising for the election campaign until after he has been nominated. There is often a lag of several weeks, between the last primary and a party's nominating convention; even in the closest race for the nomination, the winning candidate would be able to begin general election fund raising well before the day of his actual nomination with the fund-raising machinery from his primary campaign still intact. (Hart Dep. at 61-62). The risk of taking private funding only to discover that an amount exceeding the public grant cannot be raised is a great one, but it is a risk that can be measured on the basis of the candidate's fund-raising experience during the primaries. Moreover, the candidate may have excess funds from his primary campaign which may be transferred to his general election campaign funds. (*See* Black Dep. at 98). Third, Black's conclusions regarding the overall fund-raising potential of presidential candidates is based upon the Reagan campaign's ability to raise funds in the midst of a fiercely contested *primary* campaign during which Reagan sought to unseat an incumbent President. The ability of a party nominee to raise funds privately is arguably enhanced because his chances of achieving the ultimate victory are perceived as being much greater. Moreover, the party nominee may draw upon support from his former primary opponents; the potential for raising funds from all segments of the party is increased. In the 1976 presidential primary campaign, the two Republican candidates *together* raised over $18.5 million in private funds, and the thirteen Democratic candidates over $25.0 million. (Defendants' Exhibit U, FEC Disclosure Series No. 7, at 7). Fourth, Black's analysis underestimates the potential for raising large contributions from individual donors and political action committees. Individuals may contribute up to $1,000 to a privately funded campaign; political action committees up to $5,000. 2 U.S.C. §441a(a). Reagan did not pursue political action committee contributions in 1976 because many of these committees were new and lacked funds for presiden-

tial campaigns (Black Dep. at 60, 85). There are many more political action committees active today and they are far better funded. (*Id.* at 60). Similarly, the Reagan primary campaign did not pursue large donors because contributions in excess of $250 were not eligible for matching federal funds pursuant to Chapter 96 of the Internal Revenue Code. (*Id.* at 58). In a general election compaign, however, there would be a much greater incentive to pursue $1,000 donors. Finally, the cash flow problems inherent in private funding may be overstated in the plaintiffs' analysis. As the Ford campaign's media planner and production supervisor testified, media, one of the largest and most critical campaign expenditures, must be paid for only several days, not several months, in advance. (Bailey Dep. at 22-23).

The ability of nominated presidential candidates, as opposed to primary candidates, to raise the requisite amounts privately would be more relevant to the issue at hand. Plaintiffs have made no showing regarding the reasons behind the Ford campaign's decision to accept public funding in 1976. Several witnesses suggested that the Carter campaign opted for public funding as much out of ideological commitment, as out of uncertainty whether the necessary amount could be privately raised. (O'Connell Dep. at 81-82, 84; Siegel Dep. at 21). In 1972, prior to the enactment of the FECA contribution limitations, the Nixon campaign raised $60.2 million, and the McGovern campaign raised $38.7 million. Plaintiffs have not attempted to show that sums exceeding the amount of the public fund could not be privately raised in 1980 by indicating the extent to which the Nixon and McGovern sums were comprised of contributions in excess of $1,000. The court must conclude that plaintiffs have failed to show that presidential candi-

dates are compelled, as a practical matter, to accept public funding.[19]

C. *Advantages of Incumbency Under the Statutes*

Plaintiffs challenge the constitutionality of the FECA and the Fund Act on the ground that the limitation on expenditures discriminates against candidates who challenge incumbent Presidents. Plaintiffs contend that incumbent Presidents enjoy various perquisites and advantages solely by virtue of the office, the equivalent of which is available to challengers solely by the expenditure of funds.[20]

In support of this claim, plaintiffs have offered deposition testimony, exhibits and the results of a statistical survey which attempts to analyze comparative expenditure patterns of the Ford and Carter campaigns in 1976. Two of plaintiffs' proposed findings are uncontradicted in the rec-

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[19] In reaching this conclusion, the court did not consider the publications *Financing the 1968 Election* and *Financing the 1972 Election* by Herbert Alexander, offered by defendants as proof of various fund-raising practices in elections prior to 1976. The plaintiffs' objection to the admission into evidence of these publications as hearsay is sustained. The court has considered, however, the testimony of defendants' witness Hart and Bailey, despite plaintiffs' objections to their testimony as opinion evidence from unqualified experts. Although their principal campaign expertise is as a pollster and media advisor, respectively, both witnesses have had extensive experience in formulating campaign strategy and participating in budgetary and fundraising decisions. (Hart Dep. at 8, 14, 47-48; Bailey Dep. at 3-5).

[20] It is unclear the extent to which plaintiffs' claim of discrimination against challengers is premised upon their contention that all candidates are effectively compelled to accept public funding. It may be argued that a challenger retains the option to reject public funding and to raise and spend sufficient privately raised funds to nullify any of the incumbent's alleged advantages. In any event, it is by no means certain that the 1980 Democratic candidate will be an incumbent (Defendants' Ex. D).

Appendix B

ord: 1. an incumbent President and those travelling with him on campaign trips pay only the cost of a first class airline ticket for the use of Air Force I, while a challenger must charter a plane to undertake similar trips; (Black Dep. 40-42);[21] and 2. an incumbent may use the researchers and speech writers who work in his administration at no cost, while a challenger, except for volunteer services, must spend funds to hire campaign staff and develop information to formulate policy. (*Id.* at 42).

Through both depositions and the statistical study, plaintiffs have also sought to prove that: 1. in 1976, by virtue of his office, Ford was able to make news through his daily duties in the White House, while Carter was obliged to travel around the country in order to attract media attention as evidenced by Carter's larger expenditure for travel, personnel and occupancy (Black Dep. at 41-44; 91-93; *compare* Plaintiffs' Ex. No. 2 and Plaintiffs' Ex. No. 36, at pp. 19-20 *with* Plaintiffs' Ex. Nos. 4 and 6 and Plaintiffs' Ex. No. 34 at 19-20); and 2. Carter had to spend heavily early in the campaign while Ford was able to husband his resources for the stretch drive. (Plaintiffs' Ex. 33 and 35; Plaintiffs' Trial Memorandum, Appendices A-D). Defendants object to the admissibility of the results of the statistical study and working papers generated in the course of the analysis introduced for the purpose of establishing the methodology utilized. Defendants also challenge the accuracy of the study as a basis for compar-

[21] At one point in his deposition defendants' witness Bailey testified that the cost per mile to move a President is greater than for a challenger. (Bailey Dep. at 6.) He subsequently clarified his testimony, however, by stating that "the overall cost to the Government and the Committee had to be greater than the per mile cost for the Carter campaign." (*Id.* at 29). In any event, the witness admitted that he had not seen any "figures" and that his testimony was "purely a guess and could be entirely wrong." (*Id.* at 30.)

Appendix B

ing the expenditures made by the two campaigns. The court determines that the results of the study and the underlying documentation are admissible;[22] defendants' objections go more to the accuracy of the study and the weight to be given its findings than to admissibility.

The methodology employed to conduct the statistical study is as follows. The data utilized in the study were found in copies of reports filed by candidates Ford and Carter with the FEC as required by law in 1976. (Plaintiffs' Ex. 16-22). *See* 2 U.S.C. §434. These FEC reports contain information with respect to each transaction (*i.e.*, expenditure or refund) entered into by the respective campaign including the purpose, the date and the amount. Amy Gilbert, an independent certified public accountant retained for this purpose, supervised the RNC staff in the sampling and the classification of transactions. Categories of expenditure were derived from the descriptions used by the candidates in their respective reports; Carter used some 64 different types of description in his reports, while Ford used 852 different descriptions. (Deposition of Amy Gilbert at 83). From this universe of descriptions, Ms. Gilbert and the RNC Research Department derived a single expense category list (Plaintiffs' Ex. 25), comprised of 15 major expense categories, several of which were broken down into subcategories. After consultation with Dr. Rex Brown, a statistician retained by the RNC for this purpose, Ms. Gilbert and her staff sampled the 13,000 transactions reported by the Ford campaign and the 27,000 transactions reported by the Carter campaign in the following manner. In phase one of the sampling procedure, approximately

[22] Defendants object to the admission of the results of the survey on hearsay grounds. The court determines that the survey is admissible pursuant to Rules 803(24) and 1006, Fed. R. Evid.

Appendix B

5,000 transactions from each of the Ford and Carter reports were sampled by the selection of every third transaction in the Ford reports and every sixth transaction in the Carter reports. (Gilbert Dep. at 16). The second phase involved the selection of every transaction in excess of $2,000 in the Ford and Carter FEC reports. (*Id.* at 35-37). Each sampled transaction was assigned a code number corresponding to a category (or sub-category) on the expense category list (Plaintiffs' Ex. 25). Finally, in phase three of the analysis, every transaction in the Ford and Carter reports in an amount equal to or greater than $200 but less than $2,000 in three expenditure categories—media, travel and events—was added to the sample. (*Id.* at 40-41). All sampled transactions were entered into the RNC computer, which was programmed to generate the following analyses: 1. Ford and Carter campaign expenditures by week (Plaintiffs' Exs. 33, 35); 2. Ford and Carter campaign expenditures by category and, within each category, by week (Plaintiffs' Exs. 34, 36); and 3. Ford and Carter campaign expenditures by subcategory and, within each subcategory, by week (Plaintiffs' Exs. 37, 38).

Defendants raise several significant objections to the accuracy of the study as a comparison between Ford and Carter campaign expenditures. First, defendants contend that the study is inaccurate because the FEC reports necessarily reflect the subjective judgments of those persons in each campaign responsible for reporting expenditures to the FEC. Thus, to the extent each campaign was inconsistent in its characterization of transactions, or to the extent that the two campaigns characterized similar expenditures differently, mistakes in categorization were certain to result. Indeed, there are several vague "catch all" categories for which one campaign reported expenditures

Appendix B

and the other did not (*e.g.*, "Vice President", "Voter Registration", "Get-Out-the-Vote"). Plaintiffs respond to this argument by noting that the number of expenditures reported in the categories that are unique to one campaign are *de minimus* and that comparisons between *major* categories of expenditure common to both campaigns (*e.g.*, "travel", "media", "outside services") are valid. It is difficult to see why that should be so. Large discrepancies within a major category may simply reflect different modes of reporting expenditures. (Gilbert Dep. at 99). If, for example, one campaign reported a direct mail expenditure as "postage", the expenditure was placed in Category 23 ("Postage") as opposed to Category 53 ("Direct Mail"). If the same (or the opposing) campaign reported a similar expenditure as "direct mail", it was placed in Category 53. Since Ms. Gilbert and her staff generally followed the language of the FEC reports in assigning a category to a transaction, the study reflects any category discrepancies traceable to the persons who filed the reports. (*Id.* at 79-80, 139). As defendants' expert statistician testified, there is no reason, as a matter of statistical theory, to expect errors of miscategorization by campaign staff to "cancel each other out." (Deposition of Charles R. Mann at 13).

Another shortcoming of the study is its failure to include expenditures made by the national committees of both the Republican and Democratic parties pursuant to 2 U.S.C. §441a(d). (Gilbert Dep. at 101). In the 1976 campaign, the RNC spent approximately $1.9 million on behalf of Ford, and the DNC spent $2.8 million on behalf of Carter. The failure to include these amounts in the analysis of campaign expenditures, leaves approximately 8% to 12% of each campaign's total outlay unaccounted for.

Appendix B

In addition, there are problems with respect to the use of the study to draw conclusions about the timing of campaign expenditures. The data reported to the FEC concerned the date payment was made to a vendor, rather than the date on which an expense was incurred. (Mann Dep. at 46-49). Even if the data may be read to indicate that Ford made payments later in the campaign than Carter, there is insufficient evidence in the record from which it could be inferred that Ford incurred his expenses later than Carter. The President Ford Committee sought to pay its invoices as quickly as possible and generally paid vendors within one week (Deposition of Arlene Triplett, at 11-12) until the campaign became very active in late October 1976 when it often took at least two weeks to make payment. (*Id.* at 37). No evidence has been offered concerning the speed with which the Carter committee paid its invoices. Another problem with respect to timing is that the study begins with the week of July 25, 1976, with the Carter campaign's initial expenditures. Since the Republican convention was not convened until one month later, the Carter campaign's pattern of "earlier" expenditures may simply reflect its earlier start.

Finally, it is surprising that plaintiffs did not present evidence of the results of statistical tests of significance to determine whether the observed differences between Carter and Ford expenditures represent true differences rather than chance occurrences.

Assuming for the sake of argument, however, that plaintiffs' statistical survey is an accurate measure of the Carter and Ford campaign expenditures in 1976, plaintiffs' conclusions that the Carter campaign incurred greater travel expenses than the Ford campaign and that the Carter committee spent substantially more money early in the cam-

Appendix B

paign while the Ford committee husbanded resources for the stretch drive, do not demonstrate that the challenged statutes will inevitably disadvantage *all* challengers in these respects. The 1976 campaign was a single election, and the strategies adopted by the candidates and the budgetary impact of those strategies, do not necessarily reflect the optimal strategies and spending patterns available to the candidates in that campaign cannot be utilized to predict strategies and spending decisions in future campaigns when the issues, personalities and political climate will undoubtedly be different. (Mann Dep. at 19-21). The Ford campaign's "Rose Garden Strategy", the decision to keep Ford in Washington while Carter travelled around the country, was designed to create the public perception of Ford as "the President" and Carter as a "mere candidate." (Bailey Dep. at 6). As Ford's media advisor testified, that strategy was adopted because it was determined that it best fit Ford's personality and campaign abilities. (*Id.* at 37; *see also* Black Dep. at 100). A candidate, who by contrast, wished to cultivate a populist image would probably commit more funds to travel. The timing of campaign expenditures similarly implicates questions of campaign strategy. A challenger who determines that later expenditures would be more beneficial to his chances of election than earlier ones obviously retains the option to delay spending. Neither the challenged statutes nor the nature of incumbency compels a challenger to make expenditures earlier than the incumbent.

Plaintiffs' contention that Carter had to travel more than Ford in order to generate media attention is simply unsupported by the record. While it is true that an incumbent President receives free press coverage by virtue of his office (Black Dep. at 41; Hart Dep. at 31), once the

parties have announced their nominations, "there is no such thing anymore as a . . . nonvisible presidential candidate." (Bailey Dep. at 14; *see* Hart Dep. at 30-31). Indeed, the national mass media "bend over backwards" to provide equal coverage to the two major party nominees (Bailey Dep. at 19-22; *see* Black Dep. at 94; Hart Dep. at 32). Plaintiffs have submitted portions of the News Digest, a compilation of summaries of network news coverage prepared by the American Enterprise Institute in 1976. (Plaintiffs' Ex. 15). This exhibit belies plaintiffs' contention that challengers are not given equal media attention and must travel to generate news coverage. A comparison between the News Digest and Plaintiff's Exhibit 2, a schedule prepared by the RNC staff from newspaper accounts which documents the whereabouts of candidate Carter from the 1976 Democratic convention until election day (Deposition of Anneadare Wood, at 4-5B), reveals that the major television networks gave substantial coverage to Carter's acts and pronouncements made while in his hometown of Plains, Georgia (Plaintiffs' Exhibit 15, at 36-39, 50-52, 55-57, 59-60, 62, 65-66, 85, 87, 91, 92, 94-95, 97-100, 110-11, 113, 115-16, 124-25, 149-50, 164-65, 216).

The court must thus conclude that the only tangible advantages of incumbency adequately proven on this record are: 1. the President's ability to use Air Force I, thereby avoiding the cost of chartering an airplane; and 2, the availablity of the research and speechwriting services of the Executive Branch and White House staff (except to the extent that the challenger uses volunteers). Defendants have attempted to counter this showing with evidence of various disadvantages of incumbency: 1. the public's tendency to blame the incumbent for events beyond his control (Hart Dep. at 26); 2. the incumbent's need

to exercise his power in politically counter-productive ways (Black Dep. at 100); 3. his limited time to campaign because of the responsibilities of the office (*id.;* Bailey Dep. at 16-17); and 4. the relative difficulty the incumbent has in changing his public image during the campaign because it is more "fixed" than that of the challenger. (Hart Dep. at 42; Bailey Dep. at 8-9). Although these contentions may be valid, suffice it to say that each of these political facts of life may also work to an incumbent's advantage. Thus, the public may also give undeserved credit to an incubment for good developments that are not the result of his policies. By virtue of his office, an incumbent also has the opportunity to act in politically useful ways through patronage appointments and "porkbarrel" appropriations (Bailey Dep. at 65). While the press of governmental responsibilities may limit the incumbent's ability to campaign, the performance of public duties attracts media attention and well-known surrogate speakers may be employed to campaign on his behalf (Barbour Dep. at 59-62).

Defendants further argue that the challenged statutes, if anything, tend to mitigate the incumbent's advantage of superior fund-raising ability. Several witnesses testified that incumbents have at least a slight advantage in raising funds (Bailey Dep. at 37; Black Dep. at 99-100; Hart Dep. at 34). Plaintiffs do not dispute the following record evidence of fund raising superiority on the part of Congressional incumbents: 1. in the 1978 Congressional elections, non-party political action committee contributions to incumbents totalled $11.6 million, while 984 challengers received $3.0 million (Defendants' Ex. V, *1977-78 FEC Report on Financial Activity* #3); 2. in the 1976 Congressional elections, incumbents received 68% of the corporate and business-related political action committee

contributions and 63% of labor and labor-related political action committee contributions (Defendants' Ex. U, *1976 FEC Disclosure Series #9*); 3. in the 1976 House of Representatives campaigns, in which 346 incumbents ran against major party challengers, expenditures by incumbents totalled $30.7 million while expenditures by major party challengers totalled $18.1 million (*Id.*); 4. in the 1976 Senate campaigns, in which 23 incumbents ran against major party challengers, expenditures by incumbents totalled $15.2 million while expenditures by major party challengers totalled $10.3 million and incumbents outspent major party challengers in 13 of 23 races (Defendants' Ex. U, *1976 FEC Disclosure Series #6*); and 5. in the 1978 Senate campaign, incumbents outspent major party challengers in 18 of 21 races. (Defendants' Ex. U, *1977-78 FEC Report on Financial Activity, Interim Report, #3*). Defendants have made no showing, however, that incumbent Presidents have had any substantial fund-raising advantage over their major party challengers and, defendants' evidence with respect to Congressional races, though unrebutted, is not given substantial weight in view of the differences between presidential and local campaigns.

D. *Advantages of Labor Organization Support Under the Statutes*

Plaintiffs allege that the statutory scheme's conditioning of federal funding upon compliance with expenditure limitations discriminates against candidates who do not enjoy substantial labor organization support. Under 2 U.S.C. §444b(b)(2), a labor organization's communications to its members and their families "on any subject" and nonpartisan registration and get-out-the-vote drives aimed at its members and their families are exempt from the statu-

tory definition of "contribution" and "expenditure". Thus, a labor organization may engage in this activity without making a prohibited "coordinated expenditure." Although the statute grants a corporation the same rights of communication to its stockholders and executive or administrative personnel, the complaint alleges that labor organizations have a number of practical advantages in communicating with their membership on political matters, *e.g.*, the ability to impose and collect dues, geographic concentration of union membership and ready access to potential members, that render their support more valuable than that of corporations.[23]

At the outset, it must be noted that one cannot assume that labor organizations will support the Democratic presidential candidate in 1980. Although the court takes judicial notice of the fact that labor organizations have traditionally supported Democratic candidates, labor has supported Republican presidential candidates in the past (Plaintiffs' Exhibit 40, at 17). While there is evidence in the record to suggest that it is highly doubtful that the AFL-CIO will support the Republican candidate in 1980 (Plaintiffs' Ex. 41), organized labor leaders have expressed great disappointment in the Carter administration and have threatened to refuse to support him if he is renominated in 1980 (Defendants' Exs. G, H).

The sole evidence submitted by plaintiffs on this claim consists of stipulations of fact between plaintiffs and the

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[23] Once again, *see* note 20 *supra*, it is unclear whether plaintiffs' claim of discrimination is premised upon their contention that all candidates are effectively compelled to accept public funding. It may be argued that a candidate who lacks substantial labor oganization support retains the option to reject public funding and to raise and spend sufficient privately raised funds to nullify any of the alleged advantages of labor organization support.

Appendix B

American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"), the International Union, United Automobile and Agricultural Implement Workers of America ("UAW"), and the International Association of Machinists ("IAM"), respectively. The defendants have waived any objection to the accuracy of the sampling done and the data compiled for these stipulations. The contents of these stipulations are summarized below.

The AFL-CIO is a federation of 104 unions with 13,750,000 members. The Committee on Political Education ("COPE"), a standing committee of the federation, serves as its internal political arm, and coordinates the political activities of the federation and its constituent bodies, the Trade and Industrial Departments, State Central Bodies and Local Central Bodies. Its political activities include: preparation of membership lists; registration drives among members; get-out-the-vote drives among members and endorsing candidates and notifying members of the endorsements. In addition, COPE carries out a matching grant program, by which it subsidizes permitted political activities by State and Local Central Bodies. In 1976, the estimated expenditures for the various forms of COPE activity, national and state combined, were: 1. membershp identification, $538,976; 2. registration, $637,210; 3. get-out-the-vote, $1,019,168; 4. presidential endorsement and publicity, $589,494; and 5. overhead attributable to all of these activities, $193,955.

The UAW has a total membership of 1,581,904 in the United States organized by approximately 1,500 locals. Most of its political activity in 1976 was performed by Community Action Program councils ("CAP Councils"), subordinate bodies financed by membership dues, which made political contributions and expenditures including ex-

Appendix B

penditures for membership communications about candidates. The estimated aggregate expenditures in 1976 by UAW and all of its subordinate bodies for internal communications were $465,516.51 for "Carter election support" and $1,140,280.13 for "voter related activity, including voter registration and get-out-the-vote."

The IAM consists of 879,133 members organized into 1700 locals. Membership-directed political activity is generally coordinated closely with AFL-CIO State and Local Central Bodies. Although the recipients of IAM support tend to be Democrats, the emphasis is upon supporting "friends of labor". Except at the international level, the IAM's constituent bodies focus attention more upon state and local candidates than upon Presidential campaigns. In 1976, the IAM officials and staff supported Carter, but many are unhappy with his performance and may not support him should he run as the Democratic nominee in 1980. The estimated aggregate expenditures by all constituent units of IAM in 1976 were $151,358.44 for "Carter election support" and $199,541.84 for "voter registration and get-out-the-vote."

Plaintiffs have shown that major labor organizations communicate with their membership with respect to presidential elections and other political matters, but they have offered insufficient evidence from which it could be concluded (1) that presidential candidates with substantial support from labor organizations enjoy advantages over their opponents, (2) that the Republican party itself might not gain labor support, (3) that the Republican nominee would have strong corporate support, or (4) that a Republican presidential candidate who opted for private financing would not face the same alleged disadvantage, unaffected by the statutes here under attack.

Appendix B

Assuming that a major non-Republican presidential candidate gained some advantage from labor support, there is no evidence that the advantage would not be counterbalanced by major corporate support for his Republican adversary, as permitted by 2 U.S.C. §444b(b)(2). Plaintiffs have offered no evidence indicating that in 1976 corporations of comparable size and influence to the AFL-CIO, IAM and UAW failed to communicate with their stockholders or administrative personnel in a manner similar to these labor organizations or that corporate political communication favoring a Republican candidate was less effective than that of labor organizations favoring a non-Republican candidate. The potential for corporate political communication with shareholders is vast: some of the largest American corporations (*e.g.*, AT&T, General Motors, Exxon, IBM, General Electric, General Telephone and Electronics, Gulf Oil and Texaco) have more shareholders of record than employees (Defendant's Ex. I). The record fails to show that presidential candidates supported by labor organizations enjoy substantial advantage over opposing presidential candidates[24]

[24] Both plaintiffs and defendants make much of the role of corporate political action committees in Congressional campaigns. The court fails to see how the contributions record of these groups in privately financed Congressional campaigns has such bearing upon an inquiry into the power of labor organizations (and corporations) to make expenditures and contributions in a publicly financed Presidential campaign.

The evidence shows that, while many of the wealthiest political action committees affiliated with large corporations or trade associations made over two-thirds of their Congressional campaign contributions to Republicans in 1977-78, 55.2% of all expenditures by corporate political action committees were made to Democratic candidates. (Defendants' Ex. V, *1977-78 FEC Report on Financial Activity No. 2*, Vol. III). This statistic may simply reflect the fact that the Democratic Party presently has a majority in both Houses of Congress and that the political action committees have tended to contribute more heavily to incumbents, particularly if they hold chairmanships of important Congressional committees.

Appendix B

Based upon these joint findings of fact, the single-judge court, in a separate opinion, will certify constitutional questions to the United States Court of Appeals for the Second Circuit, sitting *en banc,* pursuant to 2 U.S.C. §437h(a), and the three-judge court, also in a separate opinion, will decide the questions raised regarding the implementation and construction of the Fund Act pursuant to 26 U.S.C. §9012(b).

So Ordered.

/s/ Walter R. Mansfield
Walter R. Mansfield
U.S.C.J.

/s/ Ellsworth A. VanGraafeiland
Ellsworth A. VanGraafeiland
U.S.C.J.

/s/ Lee P. Gagliardi
Lee P. Gagliardi
U.S.D.J.

/s/ Lee P. Gagliardi
Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
October 12, 1979

Appendix C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2783

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

OPINION

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Appendix C

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Before:

MANSFIELD, VAN GRAAFEILAND, *Circuit Judges,*
and GAGLIARDI, *District Judge.*

MANSFIELD, *Circuit Judge:*

In this action for declaratory and injunctive relief against enforcement of certain provisions of the Presidential Election Campaign Fund Act, Ch. 95 of Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§9001, *et seq.* ("Fund Act") and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§431, *et seq.* ("FECA"), we have, by order entered pursuant to 28 U.S.C. §2284 on

November 30, 1978, been convened as a three-judge court in accordance with §801(b) of the Fund Act, 26 U.S.C. §9011(b), which expressly grants jurisdiction to such a court to "implement or construe" any provision of the Fund Act.

On February 20, 1979, defendants renewed their motion to dismiss the action after a prior motion before the single-judge district court (Gagliardi, J.) had been denied without prejudice pending the convening of a three-judge court and certification of related issues regarding the constitutionality of FECA by it to the Court of Appeals pursuant to 2 U.S.C. §437h. See *Republican National Committee* v. *Federal Election Commission,* 461 F. Supp. 570, 575-76 (S.D.N.Y. 1978). On October 15, 1979, after hearing the parties and accepting submissions of evidence we and the single-judge district court filed "Joint Findings of Fact" (attached hereto as Appendix A).

Plaintiffs' basic contention before this three-judge court is that certain provisions of the Fund Act violate the constitutional rights of a major-party presidential candidate and his supporters. After review of the evidence in the light of applicable law we are satisfied that these claims must be dismissed.

The "Joint Findings of Fact," which set forth the nature of this action, the statutory provisions under attack, a summary of plaintiffs' claims and the facts as found by the single-judge district court and this court, need not be repeated here. Suffice it to say that the principal provisions of the Fund Act under attack as unconstitutional are those in 26 U.S.C. §9003(b),[1] which specifies that a presidential

[1] Title 26 U.S.C. §9003(b) provides:

"(b) *Major parties.*—In order to be eligible to receive any payments under section 9006, the candidates of a major party

candidate, in order to be eligible for payments out of the "Presidential Election Campaign Fund," 26 U.S.C. §9006, must certify that he or she (1) will not incur expenses in excess of the aggregate to which the candidate is entitled from the Fund under 26 U.S.C. §9004[2] and 2 U.S.C. §441a

in a presidential election shall certify to the Commission, under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004, and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(d), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002(11) have been or will be accepted by such candidates or any of their authorized committees.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations."

[2] Title 26 U.S.C. §9004 provides in pertinent part:

"§9004. *Entitlement of eligible candidates to payments*

(a) *In general.*—Subject to the provisions of this chapter—

(1) The eligible candidates of each major party in a presidential election shall be entitled to equal payments under section 9006 in an amount which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under section 320(b) (1) (B) of the Federal Election Campaign Act of 1971."

Title 26 U.S.C. §9006 provides in pertinent part:

"§9006. *Payments to eligible candidates*

(a) *Establishment of campaign fund.*—There is hereby established on the books of the Treasury of the United States a special fund to be known as the 'Presidential Election Campaign Fund'. The Secretary of the Treasury shall, from time to time, transfer to the fund an amount not in excess of the

(b)(1)(B)[3] and (2) that he will not accept private contributions except to the extent necessary to make up any deficiency in the Fund. Section 9004 prohibits the candidate from receiving payments from the Fund in excess of the amount specified by FECA, 2 U.S.C. §441a(b)(1)(B), which, in the case of a "major-party" candidate (i.e., one whose party received at least 25% of the popular vote cast in the last presidential election, 26 U.S.C. §9002(6)) is $20,000,000 as adjusted for changes in the consumer price index.[4]

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sum of the amounts designated (subsequent to the previous Presidential election) to the fund by individuals under section 6096. There is appropriated to the fund for each fiscal year, out of amounts in the general fund of the Treasury and otherwise appropriated, an amount equal to the amounts so designated during each fiscal year, which shall remain available to the fund without fiscal year limitation.

(b) *Payments from the fund.*—Upon receipt of a certification from the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary of the Treasury shall pay to such candidates out of the fund the amount certified by the Commission. Amounts paid to any such candidates shall be under the control of such candidates."

[3] Title 2 U.S.C. §441a(b) (1) (B) provides:

"(b) (1) No candidate for the office of President of the United States who is eligible under section 9003 of Title 26 (relating to condition for eligibility for payments) or under section 9033 of Title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

* * * * *

(B) $20,000,000 in the case of a campaign for election to such office."

[4] Title 2 U.S.C. §441a(c) (1) provides:

"(c) (1) At the beginning of each calendar year commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each

The grant of jurisdiction by §801(b) of the Fund Act, 26 U.S.C. §9011(b) to this court to "implement or construe" any provision of that Act would appear to require us initially to construe its constitutionality, whereas circuit courts are granted jurisdiction by 2 U.S.C. §437h(a) to "construe the constitutionality of any provision" of FECA. Plaintiffs have standing to raise the issue, since they, as committees and voters, may be precluded by the legislation from raising or contributing private funds toward the election of a Republican presidential candidate in 1980 if the candidate opts in favor of accepting payments out of the public Fund. 26 U.S.C. §9011(b)(1). Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976).

First and Second Causes of Action

Plaintiffs' First Cause of Action claims that the foregoing statutory provisions violate their First Amendment rights by conditioning eligibility for public campaign funds upon compliance with expenditure limitations. Their Second Cause of Action alleges that the First Amendment is also violated because the Republican presidential candidate in 1980 will be forced, because of "legal and practical factors" to opt in favor of pubic funding. What plaintiffs seek is the right to solicit, receive and spend both public and private campaign funds, without any limitations, even though the alternative of public financing made available by Congress to candidates was clearly "intended as a *substitute* for private contributions," *Buckley* v. *Valeo, supra,* 424 U.S. at 99. (Emphasis added).

Fundamental to both causes of action is the contention that a presidential candidate is somehow or other forced

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limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year."

Appendix C

as a practical matter to accept public funding in lieu of unlimited private funding and spending, and that this deprives the candidate and supporters of their First Amendment rights. Neither the statutes under attack nor the evidence adduced by plaintiffs supports this contention.

Each candidate remains free under the Fund Act, instead of opting for public funding, to attempt through private funding to raise more than the "$20,000,000 plus" public funding limit and to spend any amount of funds raised by private funding, without any ceiling. Indeed, major-party presidential candidates have succeeded in doing so prior to Congress' enactment of the legislation here in issue. For instance, in 1972 candidates Nixon and McGovern raised $60.2 million and $38.7 million, respectively, through private financing.[5] "Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, *and this avenue is still open to all candidates.*" *Buckley* v. *Valeo, supra,* 424 U.S. at 101 (Emphasis added).

In view of our finding that a presidential candidate is not compelled to accept public financing under the statutes or to accept the limitations imposed by 26 U.S.C. §9003, we are left with the issue of whether Congress may lawfully condition a presidential candidate's eligibility for public federal campaign funds upon the candidate's voluntary acceptance of limitations on campaign expenditures and private contributions. This question in turn raises three others: Does Congress have the power to enact such a

[5] It may be suggested that the ability of Nixon and McGovern to raise over $20 million is irrelevant because they were permitted to accept contributions over $1,000, while more recent amendments to FECA prohibit such contributions. 2 U.S.C. §441a(a)(1)(A). However, plaintiffs have made no showing as to how much of the Nixon and McGovern totals consisted of contributions over $1,000.

Appendix C

provision, and, if so, is the effect of the law to abridge either (a) the rights of the candidate or (b) the rights of his or her supporters.

We have no difficulty concluding that the imposition of such conditions lies within Congress' power to legislate under the General Welfare Clause and that, as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters.

Congress' power to enact the very statutes here under attack was recognized by the Supreme Court in *Buckley* v. *Valeo,* 424 U.S. 1, 57 n.65 (1976), where the Court stated:

> "Congress may engage in public financing of election campaigns and *may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.* Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding."[6] (Emphasis added).

The legislative history of the public financing provision gives evidence of two Congressional concerns: to give candidates the opportunity to lessen the "great drain on [their] time and energies" required by fundraising "at the expense of providing competitive debate of the issues for the electorate" and to "eliminate reliance on large private contributions" and on the implicit obligations to private

[6] The plaintiffs argue that this passage is mere dictum. We do not agree. It was because of the expenditure limitations that the Court upheld the campaign fund against the constitutional challenge of minor parties.

contributors that may arise from such reliance without decreasing the ability of the candidates to get their message to the people. Senate Report No. 93-689, at pp. 5-6, reprinted in [1974] U.S. Code Cong. & Admin. News 5591-92. If the candidate chooses to accept public financing he or she is beholden unto no person, and if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign.

While Congress may not condition benefit on the sacrifice of protected rights, see *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Frost & Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583, 593-94 (1926), the fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right or, where there is such a diminution, the burden is justified by a compelling state interest. *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963). "[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Corbitt* v. *New Jersey,* 439 U.S. 212, 218 (1978). See also *Wyman* v. *James,* 400 U.S. 309, 317-18. Where compelling governmental interests exist, Congress' power to place reasonable conditions upon expenditures of public funds, even where they affect exercise of First Amendment rights, has been recognized. See, e.g., *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127 (1947) (upholding constitutionality of U.S. Civil Service Commission order under the Hatch Act, 53 Stat. 1147, requiring removal from office of federally financed state employees engaged in state politics).

Here the conditions imposed by Congress upon receipt of public campaign financing do not infringe upon the First Amendment rights of candidates. But even if they were so viewed, the burden attributable to the limits imposed by the legislation is fully justified by the compelling state interests described above.

The Fund Act merely provides a presidential candidate with an *additional* funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding. Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will *enhance* the candidate's powers of communication and association. As the Court stated in *Buckley* v. *Valeo, supra,* 424 U.S. at 92-93:

> "Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process. . . . Subtitle H furthers, not abridges, pertinent First Amendment values."

Plaintiffs contend that they must as a practical matter accept public funding because without it they would raise less money privately and thus have less power to communicate, and at the same time they urge that the effect of public funding is to inhibit the exercise of their First Amendment right to communicate. Even if we accepted their claim that they are in practice compelled to opt for public funding, its effect would be to facilitate and enlarge their exercise of free speech over what it would

otherwise be rather than to inhibit or reduce their speaking power. Hence the limitations imposed by §9003(b) cannot violate the First Amendment rights of the candidate.

Moreover, even if there were some burden on the First Amendment rights of the candidate, the statutory scheme is supported by a compelling state interest. The goals of Congress—"to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fund-raising," *Buckley* v. *Valeo, supra,* 424 U.S. at 91—represent significant state interests, *id.* at 95-96. The public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed. If a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated. Although the total amount raised and spent by each candidate, and hence the candidate's speech power, would be increased by the sums contributed from the public coffers, the candidates would no longer be relieved of the burdens of soliciting private contributions and of avoiding unhealthy obligations to private contributors. Thus the conditions placed on the expenditure of public funds are necessary to the effectiveness of a program which furthers significant state interests.

We similarly conclude that the limitations imposed by §9003 do not abridge the rights of supporters. The plaintiffs have shown that the effect of the public funding alternative is to decrease the importance of "grass roots" political activity compared to privately financed campaigns.

Private individuals are unable to make expenditures coordinated with the campaign organizations, such as renting vans to distribute literature, paying the cost of photocopying and distributing campaign materials received from the candidate's organization, and expressing support by contributing money to the campaign. On the other hand, supporters are left with a wide range of ways to express their support. Certain activities in coordination with the campaign are excluded from the definitions of "contribution" and "expenditure," see 2 U.S.C. §431(8)(B), 9(B); supporters may contribute their time and effort. Most important, uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo, supra,* 424 U.S. at 39-51.

We note first that since the candidate has a legitimate choice whether to accept public funding and forego private contributions, the supporters may not complain that the government has deprived them of the right to contribute. There is nothing improper or unusual in recognizing that a candidate rather than his or her supporters should control the method of financing the campaign. In this respect the statute simply reflects the basic right of any person to accept or reject campaign contributions from any other person or committee, or not to run for office at all. As in *Marchioro* v. *Chaney,* —— U.S. ——, 99 S. Ct. 2243, 2248 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the courts. Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970) ("no one has a right to press even 'good' ideas on an unwilling recipient"). Moreover, it may reasonably be anticipated that in making such a decision, including whether or not to accept public

financing with its statutory conditions, the candidate will ordinarily first consult representatives of his principal supporters. In short, it would be unreasonable to preclude a candidate who prefers public financing from using it instead of private financing merely because some supporters believe that the decision deprives them of the ability to contribute to the candidate's election in the precise way they would if the campaign were privately financed.

Even if the restrictions on coordinated contributions and expenditures were seen as a restriction imposed by the government on the contributor's ability to communicate freely, those restrictions, limited as they are, could still be upheld. The "free speech" component of a contribution lies in the "symbolic expression of support" it evidences. *Buckley* v. *Valeo, supra,* 424 U.S. at 20-21. The Supreme Court in *Buckley* upheld the $1,000 contribution limitation in part because it left individuals "free to engage in independent political expression" and to express support by volunteering their services. 424 U.S. at 28. Cf. *Kovacs* v. *Cooper,* 336 U.S. 77, 88-89 (1949) (upholding ordinance regulating use of sound trucks when "[t]here is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers"). The public interest in enacting a public funding program and in limiting coordinated contributions in order to effectuate that program is a considerable one. These limitations "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." 424 U.S. at 29. The statute is "within the constitutional power of the Government"; it "furthers an important or substantial governmental interest"; that interest is "unrelated to the suppression of free expression"; and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). Accordingly, we conclude that §9003 does not violate the First Amendment rights of the plaintiffs.

Third Cause of Action

Plaintiffs' Third Cause of Action is that the statutory public financing limitations operate in a way that discriminates in favor of an incumbent candidate to the disadvantage of a challenger and thus violates the First Amendment and the Due Process Clause of the Fifth Amendment. It is claimed that incumbent Presidents can, with less campaign expenditures and through exercise of their official powers and use of public facilities, command more national attention than can challengers, who do not have such free facilities available and must spend money to gain the public's eyes and ears. As a result, plaintiffs argue, the statutory limit on the amount of campaign expenditures that may be made by a challenger who accepts public funding gives him or her less public exposure than that gained by the incumbent.

If, as the Court assumes in *Buckley* v. *Valeo,* "an incumbent usually begins the race with significant advantages," 424 U.S. at 31 n.33, and "the Government makes available other material resources to incumbents," *id.* at 33 n.38, leading to the possible conclusion that "the limitations may have a significant effect on particular challengers or incumbents," *id.* at 33, there is no indication that inequalities would be less under private financing. Indeed, regardless of whether a campaign is publicly or privately funded, it is inevitable that some candidates will

have advantages over others. To require that public funding equalize these differences would distort its purpose, which is to facilitate political communication by providing an alternative to private funding with its burdens and unhealthy influences. *See Buckley* v. *Valeo, supra,* 424 U.S. at 91. It would not only be contrary to the American democratic political process, which is founded upon a public choice between parties and candidates of varying strengths, some facing greater odds and burdens than others, see *American Party* v. *White,* 415 U.S. 767, 787-88 (1974), but would represent a departure from fundamental concepts of equal treatment. As the Court stated in *Buckley* v. *Valeo, supra*:

> "[I]t is important at the outset to note that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. Cf. *James* v. *Valtierra,* 402 U.S. 137 (1971)." 424 U.S. at 31.

As long as it has a legitimate public purpose a public campaign funding law should not be required to remedy pre-existing inequalities between candidates, cf. *Ross* v. *Moffitt,* 417 U.S. 600, 611 (1974); *San Antonio Independent School Distirct* v. *Rodriguez,* 411 U.S. 1 (1973), any more than the "equal time" requirement of the 1934 Communications Act, 47 U.S.C. §315, should be altered to remedy disparities between parties or candidates using public media. The statutes here under attack have a lawful purpose. They are neutral on their face and in operation. Accordingly

we must conclude that the Fund Act does not unlawfully discriminate in favor of incumbent candidates against challengers or deny equal protection to presidential candidates.

Fourth Cause of Action

Plaintiffs' Fourth Cause of Action alleges that the Fund Act and FECA, by reason of the campaign expenditure limitation imposed as a condition on public funding, discriminate against candidates not politically allied with a substantial number of labor organizations, and thus violate both the First Amendment and the Due Process Clause of the Fifth Amendment. It is claimed that FECA and the Fund Act allow unions to raise and spend unlimited amounts of money on "a variety of partisan political activities which can be an integral part of a presidential candidate's campaign"; that this gives a substantial advantage to candidates with labor organizational support; that it is likely that in 1980 the Democratic presidential candidate will have support from more labor organizations than the Republican candidate; that FECA, 2 U.S.C. §441b,[7] permits labor organizations to spend unlimited

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[7] Title 2 U.S.C. §441b provides in pertinent part:

"§441b. *Contributions or expenditures by national banks, corporations, or labor organizations*

(a) It is unlawful for . . . any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors . . . are to be voted for. . . .

* * * * *

(2) For purposes of this section . . . the term 'contribution or expenditure' shall . . . not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative per-

amounts, financed out of the union treasury, on communications with members which are designed to influence the presidential election, including "campaign material prepared or suggested by a candidate for President," and that corporations and other groups entitled under 2 U.S.C. §441b to spend money for partisan activities are unable for practical reasons to do so as effectively as labor organizations.

Under 2 U.S.C. §441(b)(2) a labor organization's communication with its members and their families on any subject and its non-partisan voter registration and "get out the vote" drives aimed at union members and their families are exempt from the statutory definition of "contribution" and "expenditure." However, the same statute permits corporations to engage in the same communication with their stockholders, executive and administrative personnel and their families.

The provisions of the Fund Act and FECA prohibiting certain activities and permitting others on the part of labor unions and corporations are even-handed and entirely neutral on their face. Both corporations and labor organizations are prohibited by 2 U.S.C. §441b(a) from making any contribution or expenditure in connection with a presidential election. (See footnote 7, *supra*). Moreover, as plaintiffs themselves concede, any expenditure made in "coordination" with a candidate's campaign must be treated as a "contribution" to the candidate under 2 U.S.C.

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sonnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."

§441a(7)[8] and would be illegal in the case of a candidate who opted for public funding under the Fund Act.

Thus, to the extent that plaintiffs allege that unions spend money on political activities forming an integral part of a president's campaign (Compl. ¶57) or which "can be fully coordinated with and integrated into the activities of the principal campaign committee of a presidential candidate" (Compl. ¶64), their attack is not upon the constitutionality of the Fund Act or on FECA but upon alleged non-enforcement of the provisions of these statutes, which is not an issue to be resolved by a three-judge court. To the extent that plaintiffs base their claim of unconstitutionality of the statutes upon the practical advantages of union support, such advantages can hardly be attributed to the statutes' public financing provisions, which make an

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[8] Title 2 U.S.C. §441a(a)(7) provides:

"(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States."

equal amount of money available to each major-party presidential candidate. The same advantage, if any, would exist under private financing, which each candidate is free to choose in lieu of public financing. Lastly, the evidence adduced by plaintiffs fails to show that presidential candidates supported by labor organizations have enjoyed any substantial advantage over opponents; that labor unions would necessarily support the Democratic presidential candidate or that, if they did so, any advantage would not be offset by corporate support for the Republican candidate. In short, the statutory provisions are neutral on their face and the claim of discrimination in favor of candidates having labor union support, being based on speculation rather than facts, must be dismissed for failure to demonstrate any denial of free speech or equal protection to presidential candidates and their supporters.

Fifth Cause of Action

Plaintiffs' Fifth Cause of Action, which alleges that the Fund Act and FECA violate the First and Fifth Amendments because the statutes are overbroad, must also be rejected. As we have shown, the public funding provisions of these statutes violate neither the First nor the Fifth Amendments. Public funding, as the Supreme Court noted in *Buckley, supra,* "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93. It offers the presidential candidate an alternative that may enhance his or her First Amendment powers of communication, "frees the candidates from the rigors of fundraising," 424 U.S. 91, and eliminates the "danger of corruption," *id.* at 33, without barring a candidate from deciding to adhere to private rather than public financing. Thus there is no basis for suggesting that the statute's "sweep [is] unnecessarily

broad," *NAACP* v. *Alabama,* 377 U.S. 288, 307 (1964), or that it exceeds what is "plainly legitimate," *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973).

Sixth Cause of Action

Plaintiffs' Sixth Cause of Action—that the Fund Act and FECA deprive plaintiffs of Ninth Amendment rights —must likewise be dismissed in light of Supreme Court decisions recognizing Congress' power to regulate presidential elections, see, e.g., *Burroughs* v. *United States,* 290 U.S. 534, 547-48 (1934), including the power to do so through the very legislation here attacked. *Buckley* v. *Valeo, supra,* 424 U.S. at 90.

CONCLUSION

For the foregoing reasons the complaint is dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Fund Act.

/s/ WALTER R. MANSFIELD
Walter R. Mansfield, U.S.C.J.

/s/ ELLSWORTH A. VANGRAAFEILAND
per WRM
Ellsworth A. Vangraafeiland, U.S.C.J.

/s/ LEE P. GAGLIARDI
Lee P. Gagliardi, U.S.D.J.

Dated: February 5, 1980

Appendix D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2783

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION,

Defendants.

CERTIFICATION OF CONSTITUTIONAL QUESTIONS

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Appendix D

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Certification to the United States Court of Appeals for the Second Circuit of Questions of Constitutionality of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431 et seq. Raised by Defendants' Motion to Dismiss.

GAGLIARDI, D.J.

This court, functioning as the single-judge court pursuant to 2 U.S.C. §437h(a), and the three-judge court con-

Appendix D

vened in this matter pursuant to Subtitle H, 26 U.S.C. §9011(b), issued today, in a separate opinion, their joint findings of fact pursuant to Rule 52(a), Fed. R. Civ. P. In accordance with these joint findings, this court, once again functioning as a single-judge court, determines that the following constitutional questions are fairly presented by the record and certifies these questions to the United States Court of Appeals for the Second Circuit, sitting *en banc,* pursuant to 2 U.S.C. §437h:

> Does 2 U.S.C. §441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth or Ninth Amendment to the Constitution—
>
> (a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;
>
> (b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidates' campaign) to that campaign;
>
> (c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;
>
> d) by being overbroad?

So Ordered.

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U.S.D.J.

Dated: New York, New York
October , 1979.

Appendix E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and eighty.

Present:

HON. IRVING R. KAUFMAN, *Chief Judge*
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
HON. JON O. NEWMAN
HON. AMALYA L. KEARSE

Circuit Judges.

Docket No. 79-3073

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION,

Defendants.

Appendix E

In this action in the District Court for the Southern District of New York for declaratory and injunctive relief against enforcement of certain provisions of the Presidential Election Campaign Fund Act, Ch. 95 of Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§9001, *et seq.* ("Fund Act") and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§431, *et seq.* ("FECA") on the grounds that they violate the First, Fifth, and Ninth Amendments of the Constitution, the Chief Judge of this Court, by order entered pursuant to 28 U.S.C. §2284 on November 30, 1978, convened a three-judge court to decide the constitutional issues raised with respect to the Fund Act, as required by §801(b) of that Act, 26 U.S.C. §9011(b), which expressly grants jurisdiction to such a court to "implement or construe" any provision of the Fund Act. The principal provisions of the Fund Act challenged are found in 26 U.S.C. §9003(b) and those of FECA in 2 U.S.C. §441a(b)(1)(B).

The single-judge district court (Gagliardi, D.J.) retained jurisdiction over the claims directed at FECA, advising the parties that it would entertain a motion to certify questions regarding the constitutionality of FECA to this Court sitting *en banc,* as required by 2 U.S.C. §437h. See 461 F. Supp. 570 (1978). Before certifying the questions, however, the single-judge court, sitting jointly with the three-judge court, held hearings, took evidence, and made findings of fact bearing on the constitutional issues, which were essentially the same as to both statutes, thus following substantially the same procedure as that adopted in *Buckley* v. *Valeo,* 519 F.2d 821 (D.C. Cir. 1975), *aff'd. in part and revd. in part,* 424 U.S. 1 (1976). The "Joint Findings of Fact" of the two courts were filed in the district court on October 15, 1979, and transmitted to this

Appendix E

Court by Judge Gagliardi on the same date with his "Certification of Constitutional Questions" pursuant to 2 U.S.C. §437h(a). Thereafter we requested the parties to submit briefs bearing on the constitutional issues raised with respect to 2 U.S.C. §441a(b)(1)(B) of FECA.

On February 5, 1980, the three-judge court filed its opinion (per Mansfield, C.J.) upholding the constitutionality of the provisions of the Fund Act challenged by plaintiffs and directing that the complaint be dismissed insofar as it seeks to state any claim based on the alleged unconstitutionality of the Fund Act.

Having received, reviewed and considered the findings of the district court, the parties' briefs and the opinion of the three-judge court, we conclude, in response to the questions certified to us by the district court, that the challenged provision of FECA, 2 U.S.C. §441a(b)(1)(B), does not violate the First, Fifth or Ninth Amendments of the Constitution, substantially for the reasons set forth in the opinion of the three-judge court filed in the case on February 5, 1980.

[Concurrences noted by Hon. Irving R. Kaufman, *Chief Judge,* Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Hon. William H. Mulligan, Hon. James L. Oakes, Hon. William H. Timbers, Hon. Ellsworth A. Van Graafeiland, Hon. James J. Meskill, Hon. Jon O. Newman, Hon. Amalya L. Kearse]

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
78 Civ. 2783
(Three-Judge Court)

REPUBLICAN NATIONAL COMMITTEE, THE RIPON SOCIETY OF NEW YORK, INC., PAUL C. CARDAMONE, and JOHN A. SCHMID,
Plaintiffs,

—against—

FEDERAL ELECTION COMMISSION, ROBERT O. TIERNAN, MAX L. FRIEDERSDORF, JOAN D. AIKENS, THOMAS E. HARRIS, JOHN W. MCGARRY, FRANK P. REICHE, EDMUND L. HENSHAW, JR., J. STANLEY KIMMITT, BENJAMIN R. CIVILETTI, and G. WILLIAM MILLER,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Republican National Committee, the Ripon Society of New York, Inc., Paul C. Cardamone and John A. Schmid, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge district court dismissing the complaint entered in this action on February 13, 1980.

This appeal is taken pursuant to 26 U.S.C. §9011(b).

Dated: February 19, 1980

/s/ JOHN W. CASTLES 3D
John W. Castles 3d
LORD, DAY & LORD
Attorneys for Plaintiffs
25 Broadway
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(212) 344-8480

Appendix F

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 1980 copies of the foregoing Notice of Appeal were delivered by first class mail, postage prepaid, to the addresses listed below. All parties required to be served have been served.

Charles N. Steele, Esq. (airmail)
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/s/ STEPHEN J. CRIMMINS
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STATUTORY APPENDIX

Federal Election Campaign Act of 1971

(as amended by the Federal Election Campaign Act Amendments of 1974, 1976 and 1979)

TITLE 2—THE CONGRESS

CHAPTER 14—FEDERAL ELECTION CAMPAIGNS

Section 431. Definitions.

When used in this Act:

(1) The term "election" means—

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for the purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

(3) The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b); or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in section 431(8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

(5) The term "principal campaign committee" means a political committee designated and authorized by a candidate under section 432(e)(1)

(6) The term "authorized committee" means the principal campaign committee or any other political committee authorized by a candidate under section 432(e)(1) to receive contributions or make expenditures on behalf of such candidate.

(7) The term "connected organization" means any organization which is not a political committee but which directly or indirectly establishes, administers, or financially supports a political committee.

(8)(A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include—

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services

on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display,

or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b), would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan—

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office;

(ix) any legal or accounting services rendered to or on behalf of—

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services;

(x) the payment by a State or local committee of a political party of the costs of campaign materials

(such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party; *Provided,* That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(xi) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or reference to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided,* That such payments are made from contributions subject to the limitations and prohibitions of this Act;

(xii) the payment by a State or local committee of a political party of the costs of voter registration and

get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided,* That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designed to be spent on behalf of a particular candidate or candidates;

(xiii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access; and

(xiv) any honorarium (within the meaning of section 441i).

(9)(A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i), and in accordance with section 434(a)(4)(A)(ii) with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing

made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b), would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a (b) but all such costs shall be reported in accordance with section 434(b);

(vii) the payment of compensation for legal or accounting services—

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3)such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That—

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

(10) The term "Commission" means the Federal Election Commission.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

(12) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(13) The term "identification" means—

(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and

(B) in the case of any other person, the full name and address of such person.

(14) The term "national committee" means the organization which, by virtue of the bylaws of a political

party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission.

(15) The term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.

(16) The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee, or agent of such candidate.

(18) The term "clearly identified" means that—

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

(19) The term "Act" means the Federal Election Campaign Act of 1971 as amended.

Section 432. Organization of political committees.

(1) (a) Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

(b) (1) Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution, and if the amount of the contribution is in excess of $50 the name and address of the person making the contribution and the date of receipt.

(2) Every person who receives a contribution for a political committee which is not an authorized committee shall—

(A) if the amount of the contribution is $50 or less, forward to the treasurer such contribution no later than 30 days after receiving the contribution; and

(B) if the amount of the contribution is in excess of $50, forward to the treasurer such contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving the contribution.

(3) All funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual.

(c) The treasurer of a political committee shall keep an account of—

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution;

(4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or cancelled check for each disbursement in excess of $200.

(d) The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this title for 3 years after the report is filed.

(e)(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed

with the principal campaign committee of such candidate in accordance with subsection (f)(1).

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3)(A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that—

(i) the candidate for the office of President nominated by a political party may designate the national committee of such political party as a principal campaign committee, but only if that national committee maintains separate books of account with respect to its function as a principal campaign committee; and

(ii) candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.

(B) As used in this section, the term "support" does not include a contribution by any authorized committee in amounts of $1,000 or less to an authorized committee of any other candidate.

(4) The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name.

(5) The name of any separate segregated fund established pursuant to section 441b(b) shall include the name of its connected organization.

(f)(1) Notwithstanding any other provision of this Act, each designation, statement, or report of receipts or disbursements made by an authorized committee of a candidate shall be filed with the candidate's principal campaign committee.

(2) Each principal campaign committee shall receive all designations, statements, and reports required to be filed with it under paragraph (1) and shall compile and file such designations, statements, and reports in accordance with this Act.

(g)(1) Designations, statements, and reports required to be filed under this Act by a candidate or by an authorized committee of a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, and by the principal campaign committee of such a candidate, shall be filed with the Clerk of the House of Representatives, who shall receive such designations, statements, and reports as custodian for the Commission.

(2) Designations, statements, and reports required to be filed under this Act by a candidate for the office of Senator, and by the principal campaign committee of such candidate, shall be filed with the Secretary of the Senate, who shall receive such designations, statements, and reports, as custodian for the Commission.

(3) The Clerk of the House of Representatives and the Secretary of the Senate shall forward a copy of any desig-

nation, statement, or report filed with them under this subsection to the Commission as soon as possible (but no later than 2 working days) after receiving such designation, statement, or report.

(4) All designations, statements, and reports required to be filed under this Act, except designations, statements, and reports filed in accordance with paragraphs (1) and (2), shall be filed with the Commission.

(5) The Clerk of the House of Representatives and the Secretary of the Senate shall make the designations, statements, and reports received under this subsection available for public inspection and copying in the same manner as the Commission under section 438(a)(4), and shall preserve such designations, statements, and reports in the same manner as the Commission under section 438(a)(5).

(h)(1) Each political committee shall designate one or more State banks, federally chartered depository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account and such other accounts as the committee determines at a depository designated by such committee. All receipts received by such committee shall be deposited in such accounts. No disbursements may be made (other than petty cash disbursements under paragraph (2)) by such committee except by check drawn on such accounts in accordance with this section.

(2) A political committee may maintain a petty cash fund for disbursements not in excess of $100 to any person in connection with a single purchase or transaction. A record of all petty cash disbursements shall be maintained in accordance with subsection (c)(5).

(i) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any record of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

Section 433. Registration of Political Committees; Statements

(a) Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 432(e)(1). Each separate segregated fund established under the provisions of section 441b(b) shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 431(4).

(b) The statement of organization of a political committee shall include—

(1) the name, address, and type of committee;

(2) the name, address, relationship, and type of any connected organization or affiliated committee;

(3) the name, address, and position of the custodian of books and accounts of the committee;

(4) the name and address of the treasurer of the committee;

(5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate; and

(6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.

(c) Any change in information previously submitted in a statement of organization shall be reported in accordance with section 432(g) no later than 10 days after the date of the change.

(d)(1) A political committee may terminate only when such a committee files a written statement, in accordance with section 432(g), that it will no longer receive any contributions or make any disbursements and that such committee has no outstanding debts or obligations.

(2) Nothing contained in this subsection may be construed to eliminate or limit the authority of the Commission to establish procedures for—

(A) the determination of insolvency with respect to any political committee;

(B) the orderly liquidation of an insolvent political committee, and the orderly application of its assets for the reduction of outstanding debts; and

(C) the termination of an insolvent political committee after such liquidation and application of assets.

Section 434. Reports.

(a)(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance

with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is a regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter; except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the following reports shall be filed:

(i) a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31; and

(ii) a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(A) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $100,000 or made expenditures aggregating $100,000 or anticipates receiving contributions aggregating $100,000 or more or making expenditures aggregating $100,000 or more during such year; such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general elec-

tion report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $100,000 or makes expenditures in excess of $100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 20th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either—

(A)(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter; except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered

or certified mail no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(v) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii)) is sent by registered or certified mail, the United States postmark shall be considered the date of filing of the designation, report, or statement.

(6)(A) The principal campaign committee of a candidate shall notify the Clerk, the Secretary, or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph

(4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(b) Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees, and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of the Internal Revenue Code of 1954;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period,

together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d); and

(v) any other disbursement; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 441a(b);

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6) (A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditures is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d), together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or para-

graph (5) in an aggregate amount or value in excess of $200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditure less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.*

(c)(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) and shall include—

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* For authorized committees of candidates for President and Vice President, section 434(b) shall be effective for elections occurring after January 1, 1981.

(A) the information required by subsection (b)(6)(B)(iii) indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b)(6)(B)(iii)) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

Section 435. Requirements relating to campaign advertising.

Repealed by P.L. 96-187.

Section 436. Formal requirements respecting reports and statements.

Repealed by P.L. 96-187.

Section 437. Reports on convention financing.

Each committee or other organization which—

(1) represents a State, or a political subdivision thereof, or any group of persons, in dealing with officials of a national political party with respect to matters involving a convention held in such State or political subdivision to nominate a candidate for the office of President or Vice President, or

(2) represents a national political party in making arrangements for the convention of such party held to nominate a candidate for the office of President or Vice President,

shall within 60 days following the end of the convention (but not later than 20 days prior to the date on which presidential and vice presidential electors are chosen), file with the Commission a full and complete financial statement, in

such form and detail as it may prescribe, of the sources from which it derived its funds, and the purposes for which such funds were expended.

Section 437b. Campaign Depositories.

Repealed by P.L. 96-187.

Section 437c. Federal Election Commission.

(a)(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2)(A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the

compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b)(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 95 and Chapter 96 of the Internal Revenue Code of 1954. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decisionmaking authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for

the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) or with chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(d) The Commission shall meet at least once each month and also at the call of any member.

(e) The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f)(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the executive schedule (5 U.S.C. § 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the executive schedule (5 U.S.C. § 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the general schedule (5 U.S.C. § 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail

itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either (A) by attorneys employed in its office, or (B) by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

Section 437d. Powers of the Commission.

(a) The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g (a)(8)) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954, through its general counsel;

(7) to render advisory opinions under section 437f;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpena or order of the Commission issued under subsection (a), issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) (1) Whenever the Commission submits a budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) Except as provided in section 437g(a), the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

Section 437e. Reports.

Repealed by P.L. 96-187.

Section 437f. Advisory Opinions.

(a)(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of the Internal Revenue Code of 1954 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d). No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) (1) Any advisory opinion rendered by the Commission under subsection (a) may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(d) The Commission shall make public any request made under subsection (a) for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

Section 437g. Enforcement.

(a)(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such violation. Before the Commission conducts any vote on the complaint, other

than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(1). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall

be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall make public such determination.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, has occurred or is about to occur, it may refer such

apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper show-

ing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of

such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Before taking any action under subsection (a) against any person who has failed to file a report required under section 434(a)(2)(A)(iii) for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) publish before the election the name of the person and the report or reports such person has failed to file.

(c) Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d)(1)(A) Any person who knowingly and willfuly commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of

section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g.

(C) In the case of a knowing and willful violation of section 441h, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of the Internal Revenue Act of 1954, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

Section 437h. Judicial Review.

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

Section 438. Administrative Provisions.

(a) The Commission shall—

(1) prescribe forms necessary to implement this Act;

(2) prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting;

(3) develop a filing, coding, and cross-indexing system consistent with the purposes of this Act;

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, the Secretary, or the Commission shall exclude these lists from the public record;

(5) keep such designations, reports, and statements for a period of 10 years from the date of receipt, except that designations, reports, and statements that relate solely to candidates for the House of Representatives shall be kept for 5 years from the date of their receipt;

(6) (A) compile and maintain a cumulative index of designations, reports, and statements filed under this Act, which index shall be published at regular intervals and made available for purchase directly or by mail;

(B) compile, maintain, and revise a separate cumulative index of reports and statements filed by multi-candidate committees, including in such index a list of multi-candidate committees; and

(C) compile and maintain a list of multi-candidate committees, which shall be revised and made available monthly;

(7) prepare and publish periodically lists of authorized committees which fail to file reports as required by this Act;

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d);

(9) transmit to the President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate; and

(10) serve as a national clearinghouse for the compilation of information and review of procedures with respect to the administration of Federal elections. The Commission may enter into contracts for the purpose of conducting studies under this paragraph. Reports or studies made under this paragraph shall be available to the public upon the payment of the cost thereof, except that copies shall be made available without cost, upon request, to agencies and branches of the Federal Government.

(b) The Commission may conduct audits and field investigations of any political committee required to file a report under section 434. All audits and field investigations concerning the verification for, and receipt and use of, any payments received by a candidate or committee under chapter 95 or chapter 96 of the Internal Revenue Code of 1954 shall be given priority. Prior to conducting any audit under this subsection, the Commission shall perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial

compliance with the Act. Such thresholds for compliance shall be established by the Commission. The Commission may, upon an affirmative vote of four of its members, conduct an audit and field investigation of any committee which does not meet the threshold requirements established by the Commission. Such audit shall be commenced within 30 days of such vote, except that any audit of an authorized committee of a candidate, under the provisions of this subsection, shall be commenced within 6 months of the election for which such committee is authorized.

(c) Any forms prescribed by the Commission under subsection (a)(1), and any information-gathering activities of the Commission under this Act, shall not be subject to the provisions of section 3512 of title 44, United States Code.

(d)(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted

to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5)(A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regulation, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a committee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.*

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* Section 303 of the Federal Election Campaign Act Amendments of 1979 provides as follows:

(a) The Federal Election Commission shall transmit to the Congress proposed rules and regulations necessary for the purpose of implementing the provisions of this Act, and the amendments made by this Act, prior to February 29, 1980.

(b) The provisions of section 311(d) of the Federal Election Campaign Act of 1971 allowing disapproval of rules and regulations by either House of Congress within 30 legislative days after receipt shall, with respect to rules and regulations required to be proposed under subsection (a) of this section, be deemed to allow such disapproval within 15 legislative days after receipt.

(e) Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(f) In prescribing such rules, regulations, and forms under this section, the Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations and forms which are mutually consistent. The Commission shall report to the Congress annually on the steps it has taken to comply with this subsection.

(a)(1) A copy of each report and statement required to be filed by any person under this Act shall be filed by such person with the Secretary of State (or equivalent State officer) of the appropriate State, or, if different, the officer of such State who is charged by State law with maintaining State election campaign reports. The chief executive officer of such State shall designate any such officer and notify the Commission of any such designation.

(2) For purposes of this subsection, the term "appropriate State" means—

(A) for statements and reports in connection with the campaign for nomination for election of a candidate to the office of President or Vice President, each State in which an expenditure is made on behalf of the candidate; and

(B) for statements and reports in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative in, or

Delegate or Resident Commissioner to, the Congress, the State in which the candidate seeks election; except that political committees other than authorized committees are only required to file, and Secretaries of State required to keep, that portion of the report applicable to candidates seeking election in that State.

(b) The Secretary of State (or equivalent State officer), or the officer designated under subsection (a)(1), shall—

(1) receive and maintain in an orderly manner all reports and statements required by this Act to be filed therewith;

(2) keep such reports and statements (either in original filed form or in facsimile copy by microfilm or otherwise) for 2 years after their date of receipt;

(3) make each report and statement filed therewith available as soon as practicable (but within 48 hours of receipt) for public inspection and copying during regular business hours, and permit copying of any such report or statement by hand or by duplicating machine at the request of any person, except that such copying shall be at the expense of the person making the request; and

(4) compile and maintain a current list of all reports and statements pertaining to each candidate.

Section 439a. Use of contributed amounts for certain purposes.

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a

holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of the Internal Revenue Code of 1954, or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on the date of the enactment of the Federal Election Campaign Act Amendments of 1979, no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

Section 439b. Prohibition on franked solicitations.

Repealed by P.L. 96-187.

Section 439c. Authorization of Appropriations.

There are authorized to be appropriated to the Commission for the purpose of carrying out its functions under this Act, and under chapters 95 and 96 of Title 26 of the United States Code, not to exceed $5 million for the fiscal year ending June 30, 1975. There are authorized to be appropriated to the Commission $6,000,000 for the fiscal year ending June 30, 1976, $1,500,000 for the period beginning July 1, 1976, and ending September 30, 1976, $6,000,000 for

the fiscal year ending September 30, 1977, and $7,811,500 for the fiscal year ending September 30, 1978.

Section 440. Prohibitions on contributions in name of another.

Repealed by P.L. 93-443.

Section 441. Penalties.

Repealed by P.L. 94-283.

Section 441a. Limitations on contributions and expenditures.

(a)(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any state political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch,

division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by a State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of the Internal Revenue Code of 1954. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or

indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b)(1) No candidate for the office of President of the United States who is eligible under section 9003 of the Internal Revenue Code of 1954 (relating to condition for eligibility for payments) or under section 9033 of the Internal Revenue Code of 1954 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000, in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e)), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c)(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) and subsection (d) shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the terms "price index" means the average over a calendar year of the Consumer Price Index (all items —United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(d)(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on con-

tributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e)); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

e) During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) The Commission shall prescribe rules under which any expenditure by a candidate for presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Commit-

tee, or the national committee of a political party, or any combination of such committees.

Section 441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 791(h), the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated

fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of volun-

tary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

Section 441c. Contributions by government contractors.

(a) It shall be unlawful for any person—

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land, or buildings, directly or indirectly to make any contribution of money or other things of value, or to promise expressly or im-

party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation, labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441g prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund under section 441g applies to a corporation, labor organization, or separate segregated fund to which this subsection applies.

(c) For purposes of this section, the term "labor organization" has the meaning given it by section 441g(b)(1).

Section 441d. Publication and distribution of statements and solicitations.

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public advertising,

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication shall clearly state that the communication is paid for by such other persons and authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

Section 441e. Contributions by foreign nationals.

(a) It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candi-

dates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.

(b) As used in this section, the term "foreign national" means—

(1) a foreign principal, as such term is defined by section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)), except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(20)).

Section 441f. Prohibition of contributions in the name of another.

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Section 441g. Limitation on contribution of currency.

No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceed $100, with respect to any campaign of such candidate for nomination for election, or for election, to Federal office.

Section 441h. Fraudulent misrepresentation of campaign authority.

No person who is a candidate for Federal office or an employee or agent of such a candidate shall—

(1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

Section 441i. Acceptance of excessive honorariums.

(a) No person while an elected or appointed officer or employee of any branch of the Federal Government shall accept—

(1) any honorarium of more than $2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech, or article; or

(2) honorariums (not prohibited by paragraph (1) of this section) aggregating more than $25,000 in any calendar year.

(b) If an honorarium payable to a person is paid instead at his request to a charitable organization selected by

payor from a list of 5 or more charitable organizations provided by that person, that person shall not be treated, for purposes of subsection (a), as accepting that honorarium. For purposes of this subsection, the term "charitable organization" means an organization described in section 170(c) of the Internal Revenue Code of 1954.

(c) For purposes of determining the aggregate amount of honorariums received by a person during any calendar year, amounts returned to the person paying an honorarium before the close of the calendar year in which it was received shall be disregarded.

(d) For purposes of paragraph (2) of subsection (a), an honorarium shall be treated as accepted only in the year in which that honorarium is received.

Section 441j. Penalty for Violation.

Repealed by P.L. 96-187.

Section 442. Authority to procure technical support and other services and incur travel expenses; payment of such expenses.

For the purpose of carrying out his duties under the Federal Election Campaign Act of 1971 [as amended], the Secretary of the Senate is authorized, from and after July 1, 1972—

(1) to procure technical support services,

(2) to procure the temporary or intermittent services of individual technicians, experts, or consultants, or organizations thereof, in the same manner and

under the same conditions, to the extent applicable, as a standing committee of the Senate may procure such services under section 72a(i) of this title,

(3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency, and

(4) to incur official travel expenses.

Payments to carry out the provisions of this paragraph shall be made from funds included in the appropriation "Miscellaneous Items" under the heading "Contingent Expenses of the Senate" upon vouchers approved by the Secretary of the Senate. All sums received by the Secretary under authority of the Federal Election Campaign Act of 1971 [as amended] shall be covered into the Treasury as miscellaneous receipts.

Section 451. Extension of credit by regulated industries; regulations.

The Civil Aeronautics Board, the Federal Communications Commission, and the Interstate Commerce Commission shall each promulgate, within 90 days after February 7, 1972, its own regulations with respect to the extension of credit, without security, by any person regulated by such Board or Commission to any candidate for Federal office, or to any person on behalf of such a candidate, for goods furnished or services rendered in connection with the campaign of such candidate for nomination for election, or election, to such office.

Section 452. Prohibition against use of certain Federal funds for election activities; definitions.

No part of any funds appropriated to carry out the Economic Opportunity Act of 1964 shall be used to finance, directly or indirectly, any activity designed to influence the outcome of any election to Federal office, or any voter registration activity, or to pay the salary of any officer or employee of the Office of Economic Opportunity who, in his official capacity as such an officer or employee, engages in any such activity.

Section 453. Effect on State law.

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

Section 454. Partial invalidity.

If any provision of this title, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the title and the application of such provision to other persons and circumstances shall not be affected thereby.

Section 455. Period of limitations.

(a) No person shall be prosecuted, tried, or punished for any violation of title III of this Act, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

(b) Notwithstanding any other provision of law—

(1) the period of limitations referred to in subsection (a) shall apply with respect to violations referred

to in such subsection committed before, on, or after the effective date of this section; and

(2) no criminal proceeding shall be instituted against any person for any act or omission which was a violation of any provision of Title III of this Act, as in effect on December 31, 1974, if such act or omission does not constitute a violation of any such provision, as amended by the Federal Election Campaign Act Amendments of 1974.

Nothing in this subsection shall affect any proceeding pending in any court of the United States on the effective date of this section.

Presidential Election Campaign Fund Act

TITLE 26. INTERNAL REVENUE CODE

CHAPTER 95—PRESIDENTIAL ELECTION CAMPAIGN FUND

Section 9001. Short Title.

This chapter may be cited as the "Presidential Election Campaign Fund Act".

Section 9002. Definitions.

For purposes of this chapter—

(1) the term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization;

(2) the term "candidate" means, with respect to any presidential election, an individual who—

(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party; or

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to

him on the election ballot) as the candidate of a political party for election to either such office in 10 or more States.

For purposes of paragraphs (6) and (7) of this section and purposes of section 9004(a)(2), the term "candidate" means, with respect to any preceding presidential election, an individual who received popular votes for the office of President in such election. The term "candidate" shall not include any individual who has ceased actively to seek election to the office of President of the United States or to the office of Vice President of the United States, in more than one State.

(3) The term "Commission" means the Federal Election Commission established by section 437g(a)(1) of Title 2, United States Code.

(4) The term "eligible candidates" means the candidates of a political party for President and Vice President of the United States who have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003 of this title.

(5) The term "fund" means the Presidential Election Campaign Fund established by section 9006(a) of this title.

(6) The term "majority party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office.

(7) The term "minor party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office.

(8) The term "new party" means, with respect to any presidential election, a political party which is neither a major party nor a minor party.

(9) The term "political committee" means any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

(10) The term "presidential election" means the election of presidential and vice presidential electors.

(11) The term "qualified campaign expense" means an expense—

(A) incurred—

(i) by the candidate of a political party for the office of President to further his election to such office or to further the election of the candidate of such political party for the office of Vice President, or both,

(ii) by the candidate of a political party for the office of Vice President to further his election to such office or to further the election of the candidate of such political party for the office of President, or both, or

(iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices;

(B) incurred within the expenditure report period (as defined in paragraph (12)), or incurred before the beginning of such period to the extent such expense is for property, services, or facilities used during such period; and

(C) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid.

An expense shall be considered as incurred by a candidate or an authorized committee if it is incurred by a person authorized by such candidate or such committee, as the case may be, to incur such expense on behalf of such candidate or such committee. If an authorized committee of the candidates of a political party for President and Vice President of the United States also incurs expenses to further the election of one or more other individuals to Federal, State, or local elective public office, expenses incurred by such committee which are not specifically to further the election of such other individual or individuals shall be considered as incurred to further the election of such candidates for President and Vice President in such proportion as the commission prescribes by rules or regulations.

(12) The term "expenditure report period" with respect to any presidential election means—

(A) in the case of a major party, the period beginning with the first day of September before the election, or, if earlier, with the date on which such major party at its national convention nominated its candidate for election to the office of President of the United States, and ending 30 days after the date of the presidential election; and

(B) in the case of a party which is not a major party, the same period as the expenditure report period of the major party which has the shortest expenditure report period for such presidential election under subparagraph (A).

Section 9003. Condition for eligibility for payment.

(a) *In general.* In order to be eligible to receive any payments under section 9006, the candidates of a political party in a presidential election shall, in writing—

(1) agree to obtain and furnish to the Commission such evidence as it may request of the qualified campaign expenses of such candidates;

(2) agree to keep and furnish to the Commission such records, books, and other information as it may request; and

(3) agree to an audit and examination by the Commission under section 9007 and to pay any amounts required to be paid under such section.

(b) *Major parties.* In order to be eligible to receive any payments under section 9006, the candidates of a major party in a presidential election shall certify to the Commission, under penalty of prejury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004; and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(d), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002(11) have been or will be accepted by such candidates or any of their authorized committees.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(c) *Minor and new parties.* In order to be eligible to receive any payments under section 9006, the candidates of a minor or new party in a presidential election shall certify to the Commission, under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004; and

(2) such candidates and their authorized committees will accept and expend or retain contributions to defray qualified campaign expenses only to the extent that the qualified campaign expenses incurred by such candi-

dates and their authorized committees certified to under paragraph (1) exceed the aggregate payments received by such candidates out of the fund pursuant to section 9006.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(d) *Withdrawal by candidate.* In any case in which an individual ceases to be a candidate as a result of the operation of the last sentence of section 9002(2), such individual—

(1) shall no longer be eligible to receive any payments under section 9006, except that such individual shall be eligible to receive payments under such section to defray qualified campaign expenses incurred while actively seeking election to the office of President of the United States or to the office of Vice President of the United States in more than one State; and

(2) shall pay to the Secretary, as soon as practicable after the date upon which such individual ceases to be a candidate, an amount equal to the amount of payments received by such individual under section 9006 which are not used to defray qualified campaign expenses.

Section 9004. Entitlement of eligible candidates to payment.

(a) In general. Subject to the provisions of this chapter—

(1) The eligible candidates of each major party in a presidential election shall be entitled to equal payments

under section 9006 in an amount which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under section 411a(b)(1)(B) of Title 2, United States Code.

(2)(A) The eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election.

(B) If the candidate of one or more political parties (not including a major party) for the office of President was a candidate for such office in the preceding presidential election and received 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office, such candidate and his running mate for the office of Vice President, upon compliance with the provisions of section 9003(a) and (c), shall be treated as eligible candidates entitled to payments under section 9006 in an amount computed as provided in subparagraph (A) by taking into account all the popular votes received by such candidate for the office of President in the preceding presidential election. If eligible candidates of a minor party are entitled to payments under this subparagraph, such entitlement shall be reduced by the amount of the entitlement allowed under subparagraph (A).

(3) The eligible candidates of a minor party or a new party in a presidential election whose candidate for President in such election receives, as such candidate, 5 percent or more of the total number of popular votes cast for the office of President in such election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by such candidate in such election bears to the average number of popular votes received in such election by the candidates for President of the major parties. In the case of eligible candidates entitled to payments under paragraph (2), the amount allowable under this paragraph shall be limited to the amount, if any, by which the entitlement under the preceding sentence exceeds the amount of the entitlement under paragraph (2).

(b) *Limitations.* The aggregate payments to which the eligible candidates of a political party shall be entitled under subsections (a)(2) and (3) with respect to a presidential election shall not exceed an amount equal to the lower of—

(1) the amount of qualified campaign expenses incurred by such eligible candidates and their authorized committees, reduced by the amount of contributions to defray qualified campaign expenses received and expended or retained by such eligible candidates and such committees; or

(2) the aggregate payments to which the eligible candidates of a major party are entitled under subsec-

tion (a)(1), reduced by the amount of contributions described in paragraph (1) of this subsection.

(c) *Restrictions.* The eligible candidates of a political party shall be entitled to payments under subsection (a) only—

(1) to defray qualified campaign expenses incurred by such eligible candidates or their authorized committees; or

(2) to repay loans the proceeds of which were used to defray such qualified campaign expenses, or otherwise to restore funds (other than contributions to defray qualified campaign expenses received and expended by such candidates or such committees) used to defray such qualified campaign expenses.

(d) *Expenditures from personal funds.* In order to be eligible to receive any payment under section 9006, the candidate of a major, minor, or new party in an election for the office of President shall certify to the Commission, under penalty of perjury, that such candidate will not knowingly make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaign for election to the office of President in excess of, in the aggregate, $50,000. For purposes of this subsection, expenditures from personal funds made by a candidate of a major, minor, or new party for the office of Vice President shall be considered to be expenditures by the candidate of such party for the office of President.

(e) *Definition of immediate family.* For purposes of subsection (d), the term "immediate family" means a candidate's spouse, and any child, parent, grandparent,

brother, half-brother, sister, or half-sister of the candidate, and the spouses of such persons.

Section 9005. Certification by Commission.

(a) *Initial certifications.* Not later than 10 days after the candidates of a political party for President and Vice President of the United States have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003, the Commission shall certify to the Secretary of the Treasury for payment to such eligible candidates under section 9006 payment in full of amounts to which such candidates are entitled under section 9004.

(b) *Finality of certifications and determinations.* Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter shall be final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9007 and judicial review under section 9011.

Section 9006. Payments to eligible candidates.

(a) *Establishment of campaign fund.* There is hereby established on the books of the Treasury of the United States a special fund to be known as the "Presidential Election Campaign Fund". The Secretary of the Treasury shall, from time to time, transfer to the fund an amount not in excess of the sum of the amounts designated (subsequent to the previous presidential election) to the fund by individuals under section 6096. There is appropriated to the fund for each fiscal year, out of amounts in the general fund of the Treasury not otherwise appropriated, an amount equal to the amounts so designated during each fiscal year,

which shall remain available to the fund without fiscal year limitation.

(b) *Payment from the fund.* Upon receipt of a certification from the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary of the Treasury shall pay to such candidates out of the fund the amount certified by the Commission. Amounts paid to any such candidates shall be under the control of such candidates.

(c) *Insufficient amounts in fund.* If at the time of a certification by the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary determines that the moneys in the fund are not, or may not be, sufficient to satisfy the full entitlements of the eligible candidates of all political parties, he shall withhold from such payment such amount as he determines to be necessary to assure that the eligible candidates of each political party will receive their pro rata share of their full entitlement. Amounts withheld by reason of the preceding sentence shall be paid when the Secretary determines that there are sufficient moneys in the fund to pay such amounts, or portions thereof, to all eligible candidates from whom amounts have been withheld, but, if there are not sufficient moneys in the fund to satisfy the full entitlement of the eligible candidates of all political parties, the amounts so withheld shall be paid in such manner that the eligible candidates of each political party receive their pro rata share of their full entitlement. In any case in which the Secretary determines that there are insufficient moneys in the fund to make payments under subsection (b), section 9008(b)(3) and section 9037(b), moneys shall not be made available from any other source for the purpose of making such payments.

Section 9007. Examinations and audits; repayments.

(a) *Examinations and audits.* After each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President.

(b) *Repayments.*

(1) If the Commission determines that any portion of the payments made to the eligible candidates of a political party under section 9006 was in excess of the aggregate payments to which candidates were entitled under section 9004, it shall so notify such candidates, and such candidates shall pay to the Secretary of the Treasury an amount equal to such portion.

(2) If the Commission determines that the eligible candidates of a political party and their authorized committees incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party were entitled under section 9004, it shall notify such candidates of the amount of such excess and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(3) If the Commission determines that the eligible candidates of a major party or any authorized committee of such candidates accepted contributions (other than contributions to make up deficiencies in payments out of the fund on account of the application of section 9006(c)) to defray qualified campaign expenses (other than qualified campaign expenses with respect to which payment is required under paragraph (2)), it shall notify such candidates of the amount of the contribu-

tions so accepted, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(4) If the Commission determines that any amount of any payment made to the eligible candidates of a political party under section 9006 was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray such qualified campaign expenses,

it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(5) No payment shall be required from the eligible candidates of a political party under this subsection to the extent that such payment, when added to other payments required from such candidates under this subsection, exceeds the amount of payments received by such candidates under section 9006.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a presidential election more than 3 years after the day of such election.

(d) *Deposit of repayments.* All payments received by the Secretary of the Treasury under subsection (b) shall be deposited by him in the general fund of the Treasury.

Section 9008. Payments for Presidential nominating conventions.

(a) *Establishment of accounts.* The Secretary shall maintain in the fund, in addition to any account which he maintains under section 9006(a), a separate account for the national committee of each major party and minor party. The Secretary shall deposit in each such account an amount equal to the amount which each such committee may receive under subsection (b). Such deposits shall be drawn from amounts designated by individuals under section 6096 and shall be made before any transfer is made to any account for any eligible candidate under section 9006(a).

(b) *Entitlement to payments from the fund.*

(1) *Major parties.* Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $3,000,000.

(2) *Minor parties.* Subject to the provisions of this section, the national committee of a minor party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed an amount which bears the same ratio to the amount the national committee of a major party is entitled to receive under paragraph (1) as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the

United States of the major parties in the preceding presidential election.

(3) *Payments.* Upon receipt of certification from the Commission under subsection (g), the Secretary shall make payments from the appropriate account maintained under subsection (a) to the national committee of a major party or minor party which elects to receive its entitlement under this subsection. Such payments shall be available for use by such committee in accordance with the provisions of subsection (c).

(4) *Limitation.* Payments to the national committee of a major party or minor party under this subsection from the account designated for such committee shall be limited to the amounts in such account at the time of payment.

(5) *Adjustment of entitlements.* The entitlements established by this subsection shall be adjusted in the same manner as expenditure limitations established by section 441a(b) and section 441a(d) of Title 2, United States Code are adjusted pursuant to the provisions of Section 441a(c) of Title 2, United States Code.

(c) *Use of funds.* No part of any payment made under subsection (b) shall be used to defray the expenses of any candidate or delegate who is participating in any presidential nominating convention. Such payments shall be used only—

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

(d) *Limitation of expenditures.*

(1) *Major parties.* Except as provided by paragraph (3), the national committee of a major party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of payments to which such committee is entitled under subsection (b)(1).

(2) *Minor parties.* Except as provided by paragraph (3), the national committee of a minor party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of the entitlement of the national committee of a major party under subsection (b)(1).

(3) *Exception.* The Commission may authorize the national committee of a major party or minor party to make expenditures which, in the aggregate, exceed the limitation established by paragraph (1) or paragraph (2) of this subsection. Such authorization shall be based upon a determination by the Commission that, due to extraordinary and unforeseen circumstances, such expenditures are necessary to assure the effective operation of the presidential nominating convention by such committee.

(4) *Provision of legal or accounting services.* For purposes of this section, the payment, by any person

other than the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services) of compensation to any individual for legal or accounting services rendered to or on behalf of the national committee of a political party shall not be treated as an expenditure made by or on behalf of such committee with respect to its limitations on presidential nominating convention expenses.

(e) *Availability of payments.* The national committee of a major party or minor party may receive payments under subsection (b)(3) beginning on July 1 of the calendar year immediately preceding the calendar year in which a presidential nominating convention of the political party involved is held.

(f) *Transfer to the fund.* If, after the close of a presidential nominating convention and after the national committee of the political party involved has been paid the amount which it is entitled to receive under this section, there are moneys remaining in the account of such national committee, the Secretary shall transfer the moneys so remaining to the fund.

(g) *Certification by Commission.* Any major party or minor party may file a statement with the Commission in such form and manner and at such times as it may require, designating the national committee of such party. Such statement shall include the information required by section 433(b) of the Federal Election Campaign Act of 1971, together with such additional information as the Commission may require. Upon receipt of a statement filed under the preceding sentences, the Commission promptly shall

verify such statement according to such procedures and criteria as it may establish and shall certify to the Secretary for payment in full to any such committee of amounts to which such committee may be entitled under subsection (b). Such certifications shall be subject to an examination and audit which the Commission shall conduct no later than December 31 of the calendar year in which the presidential nominating convention involved is held.

(h) *Repayments.* The Commission shall have the same authority to require repayments from the national committee of a major party or a minor party as it has with respect to repayments from any eligible candidate under section 9007(b). The provisions of section 9007(c) and section 9007(d) shall apply with respect to any repayment required by the Commission under this subsection.

Section 9009. Reports to Congress; regulations.

(a) *Reports.* The Commission shall, as soon as practicable after each presidential election, submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;

(2) the amounts certified by it under section 9005 for payment to eligible candidates of each political party;

(3) the amount of payments, if any, required from such candidates under section 9007, and the reasons for each payment required;

(4) the expenses incurred by the national committee of a major party or minor party with respect to a presidential nominating convention;

(5) the amounts certified by it under section 9008(g) for payment to each such committee; and

(6) the amount of payments, if any, required from such committees under section 9008(h), and the reasons for each such payment.

Each report submitted pursuant to this section shall be printed as a Senate document.

(b) *Regulations, etc.* The Commission is authorized to prescribe such rules and regulations in accordance with the provisions of subsection (c), to conduct such examinations and audits (in addition to the examination and audits required by section 9007(a)), to conduct such investigations, and to require the keeping and submission of such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation

set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. Whenever a committee of the House of Representatives reports any resolution relating to any such rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.

(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(4) For purposes of this subsection, the term "rule or regulation" means a provision or series of interrelated provisions stating a single separable rule of law.

Section 9010. Participation by commission in judicial proceedings.

(a) *Appearance by counsel.* The Commission is authorized to appear in and defend against any action filed under section 9011, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service, and whose compensation

it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) *Recovery of certain payments.* The Commission is authorized through attorneys and counsel described in subsection (a) to appear in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary of the Treasury as a result of examination and audit made pursuant to section 9007.

(c) *Declaratory and injunctive relief.* The Commission is authorized through attorneys and counsel described in subsection (a) to petition the courts of the United States for declaratory or injunctive relief concerning any civil matter covered by the provisions of this subtitle or section 6096. Upon application of the Commission, an action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) *Appeal.* The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

Section 9011. Judicial Review.

(a) *Review of certification, determination, or other action by the Commission.* Any certification, determination,

or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the U.S. Court of Appeals for the District of Columbia upon petition filed in such Court by any interested person. Any petition filed pursuant to this section shall be filed within 30 days after the certification, determination, or other action by the Commission for which review is sought.

(b) *Suits to implement chapter.*

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [sic] any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, United States Code, and any appeal shall lie to the Supreme Court: It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

Section 9012. Criminal Penalties.

(a) *Excess expenses.*

(1) It shall be unlawful for an eligible candidate of a political party for President and Vice President in a presidential election or any of his authorized committees knowingly and willfully to incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004 with respect to such election. It shall be unlawful for the national committee of a major or minor party knowingly and willfully to incur expenses with respect to a presidential nominating convention in excess of the expenditure limitation applicable with respect to such committee under section 9008(d), unless the incurring of such expenses is authorized by the Commission under section 9008(d)(3).

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(b) *Contributions.*

(1) It shall be unlawful for an eligible candidate of a major party in a presidential election or any of his authorized committees knowingly and willfully to accept any contributions to defray qualified campaign expenses, except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(c), or to defray expenses which would be

qualified campaign expenses but for subparagraph (C) of section 9002(11).

(2) It shall be unlawful for an eligible candidate of a political party (other than a major party) in a presidential election or any of his authorized committees knowingly and willfully to accept and expend or retain contributions to defray qualified campaign expenses in an amount which exceeds the qualified campaign expenses incurred with respect to such election by such eligible candidate and his authorized committees.

(3) Any person who violates paragraph (1) or (2) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(c) *Unlawful use of payments.*

(1) It shall be unlawful for any person who receives any payment under section 9006, or to whom any portion of any payment received under such section is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray such qualified campaign expenses.

(2) It shall be unlawful for the national committee of a major party or minor party which receives any payment under section 9008(b)(3) to use, or authorize the use of, such payment for any purpose other than a purpose authorized by section 9008(c).

(3) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(d) *False statements, etc.*

(1) It shall be unlawful for any person knowingly and willfully—

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this subtitle, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or

(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(e) *Kickbacks and illegal payments.*

(1) It shall be unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to give or accept any kickback or any illegal payment in connection with any expense incurred by such committee with respect to presidential nominating convention.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees, or in connection with expense incurred by the national committee of a major party or minor party with respect to a presidential nominating convention, shall pay to the Secretary of the Treasury, for deposit in the general fund of the Treasury, an amount equal to 125 percent of the kickback or payment received.

(f) *Unauthorized expenditures and contributions.*

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to—

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions; or

(B) expenditures by any organization described in section 501(c) which is exempt from tax under section 501(a) in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(g) *Unauthorized disclosure of information.*

(1) It shall be unlawful for any individual to disclose any information obtained under the provisions of this chapter except as may be required by law.

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

Supreme Court, U.S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1373, 79-1374, and 79-1375

In the Supreme Court of the United States

OCTOBER TERM, 1979

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPUBLICAN NATIONAL COMMITTEE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM (NO. 79-1373), MOTION TO DISMISS (NO. 79-1375), AND BRIEF IN OPPOSITION (NO. 79-1374) ON BEHALF OF ATTORNEY GENERAL BENJAMIN R. CIVILETTI AND SECRETARY OF THE TREASURY G. WILLIAM MILLER

WADE H. MCCREE, JR.
Solicitor General

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Washington, D.C. 20530

INDEX

	Page
Opinions below	2
Jurisdiction	3
Statutes involved	3
Questions presented	4
Statement	4
Argument	14
Conclusion	26

CITATIONS

Cases:

Brown v. *GSA*, 425 U.S. 820	16
Buckley v. *Valeo*, 519 F.2d 817	13
Buckley v. *Valeo*, 424 U.S. 1	7, 9, 13, 15, 16, 17, 19, 20, 21, 22-23
Civil Service Commission v. *Letter Carriers*, 413 U.S. 548	7
Clark v. *Valeo*, 559 F.2d 642, aff'd, 431 U.S. 950	16
Cousins v. *Wigoda*, 419 U.S. 477	22
Marchioro v. *Chaney*, 442 U.S. 191	22
Perry v. *Sinderman*, 408 U.S. 593	19
Police Department v. *Mosley*, 408 U.S. 92	25
Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667	16
United States v. *CIO*, 335 U.S. 106	25

Constitution, statutes and rule:

United States Constitution:

First Amendment	4, 10, 13, 16, 19, 20, 25
Fifth Amendment	4, 13, 16
Ninth Amendment	4, 13, 16

Constitution, statutes and rule—Continued	Page
Declaratory Judgement Act, 28 U.S.C. 2201	16
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*:	
2 U.S.C. 437g(a)(5)(C)	12
2 U.S.C. 437h(a)	13, 15, 16
2 U.S.C. 437h(b)	15
2 U.S.C. 441(b)(a)	25
2 U.S.C. 441a(a)(1)	5
2 U.S.C. 441a(a)(2)	5
2 U.S.C. 441a(a)(7)	6
2 U.S.C. 441a(b)(1)(B)	5, 15
2 U.S.C. 441a(b)(1)(c)	5
2 U.S.C. 441b(b)(2)(A)	25
2 U.S.C. 441j	12
Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 *et seq.*: (to be codified at)	
2 U.S.C. 431(8)(B)	23
2 U.S.C. 431(8)(B)(i)	6
2 U.S.C. 431(8)(B)(ii)	6
2 U.S.C. 431(8)(B)(iv)	6
2 U.S.C. 431(8)(B)(vi)	25
2 U.S.C. 431(8)(B)(x)	24
2 U.S.C. 431(9)(B)	23
2 U.S.C. 431(9)(B)(iii)	7, 25
2 U.S.C. 431(9)(B)(v)	25
2 U.S.C. 431(9)(B)(viii)	7, 24
Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*:	
26 U.S.C. 9001	4
26 U.S.C. 9002(6)	4

Constitution, statutes and rule—Continued	Page
26 U.S.C. 9003(b)	6
26 U.S.C. 9003(b)(1)	9
26 U.S.C. 9004	17
26 U.S.C. 9004(a)(1)	5, 6, 9
26 U.S.C. 9004(a)(2)	4
26 U.S.C. 9004(a)(3)	4
26 U.S.C. 9006	12
26 U.S.C. 9006(a)	5
26 U.S.C. 9011	16
26 U.S.C. 9011(b)	12, 14, 15, 16
26 U.S.C. 9012	12
Pub. L. No. 94-381, Section 2, 90 Stat. 1119	14
Pub. L. No. 96-187, Section 105, 93 Stat. 1354	12
18 U.S.C. (Supp. IV 1970 ed.) 608(c)(1)(B)	8, 9
18 U.S.C. (Supp. IV 1970 ed.) 608(d)	9
26 U.S.C. 6096	5, 12
26 U.S.C. 6096(a)	5
28 U.S.C. 1331	13, 14, 16
28 U.S.C. 2282	14
Sup. Ct. R. 20	17
Miscellaneous:	
H.R. Rep. No. 96-422, 96th Cong., 1st Sess. (1979)	6
S. Rep. No. 93-689, 93d Cong., 2d Sess. (1974)	17
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978)	15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1373

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 79-1374

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-1375

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM (NO. 79-1373), MOTION TO DISMISS (NO. 79-1375), AND BRIEF IN OPPOSITION (NO. 79-1374) ON BEHALF OF ATTORNEY GENERAL BENJAMIN R. CIVILETTI AND SECRETARY OF THE TREASURY G. WILLIAM MILLER

The Solicitor General, on behalf of Attorney General Benjamin R. Civiletti and Secretary of the Treasury G. William Miller, moves to affirm the judgment of the district court in No. 79-1373 and to dismiss the appeal in No. 79-1375 and submits this brief in opposition to the petition for a writ of certiorari before judgment in No. 79-1374.

OPINIONS BELOW

The opinion of the district court on certain preliminary jurisdictional questions is reported at 461 F. Supp. 570. The joint findings of fact of the three-judge district court in No. 79-1373 and the single-judge district court in No. 79-1375 (J.S. App. 3a-43a)[1] are not yet reported. The opinion of the three-judge district court in No. 79-1373 (J.S. App. 44a-63a) is not yet reported. The opinion of the court of appeals in No. 79-1375 (J.S. App. 67a-69a; 79-1375 J.S. App. 3a-5a) is not yet reported. The opinion of the single-judge district court in No. 79-1374 (79-1374 Pet. App. 1a-2a) is not yet reported.

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[1] Unless otherwise noted, "J.S." refers to the jurisdictional statement in No. 79-1373.

JURISDICTION

The judgment of the district court in No. 79-1373 (J.S. App. 1a-2a) was entered on February 13, 1980, and the notice of appeal to this Court (*id.* at 70a-71a) was filed on February 19, 1980. The jurisdiction of the district court was invoked under 26 U.S.C. 9011 (b), and the jurisdiction of this Court rests on the same section.

The judgment of the district court in No. 79-1374 (79-1374 Pet. App. 1a-2a) was entered on February 14, 1980, and the notice of appeal to the court of appeals (*id.* at 3a-4a) was filed on February 19, 1980. The appeal was docketed in the court of appeals on February 29, 1980 (No. 80-3013). The jurisdiction of the district court was invoked under 28 U.S.C. 1331, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 79-1375 (79-1375 J.S. App. 1a-2a) was entered on February 6, 1980, and the notice of appeal to this Court (*id* at 6a-7a) was filed on February 19, 1980. The jurisdiction of the district court was invoked under 2 U.S.C. 437h(a), and the jurisdiction of this Court is invoked under 2 U.S.C. 437h(b).[2]

STATUTES INVOLVED

The Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, and the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, are set forth at J.S. App. SA1-SA108.

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[2] As explained below (see note 10, *infra*), we question the jurisdiction of this Court in No. 79-1375.

QUESTIONS PRESENTED

1. Whether the limitation on overall expenditures by a candidate for President who chooses to accept public funding of his campaign under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, in lieu of raising funds from private contributors without being subject to an overall limitation on expenditures, violates the candidate's rights under the First, Fifth or Ninth Amendment.

2. Whether a candidate's agreement, when he accepts public funding of his campaign, to abide by expenditure limitations and to forgo private contributions, violates the First, Fifth or Ninth Amendment rights of potential campaign contributors.

STATEMENT

1. A candidate for the office of President of the United States nominated by one of the country's major political parties—the Republican Party and the Democratic Party—may finance his general election campaign in one of two ways. He may raise funds in the traditional manner, through private contributions, or he may accept public financing of his campaign under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.* (hereinafter the "Fund Act").[3]

[3] A "major party" is defined under the Presidential Election Campaign Fund Act as a political party whose candidate for the office of President received at least 25% of the total popular vote cast in the preceding presidential election. 26 U.S.C. 9002(6). Public funding is also available, on a modified basis, for certain other candidates. 26 U.S.C. 9004 (a)(2) and (3).

If the candidate chooses to rely on private contributions, he is not subject to any limitation on his overall campaign expenditures. However, the Federal Election Campaign Act (FECA), imposes a $1,000 ceiling on the amount a person may contribute to the candidate or his authorized campaign committee. 2 U.S.C. 441a(a)(1).[4]

The Fund Act establishes a different framework for those candidates who choose to accept public financing. Section 9006(a) of the Fund Act (26 U.S.C.) establishes a Presidential Election Campaign Fund, financed from general revenues. The amount of monies in the Fund is determined by the aggregate amount designated by taxpayers on their income tax returns under 26 U.S.C. 6096, which permits a taxpayer to direct the payment into the Fund of one dollar of his tax liability in any given year. Each major-party candidate for President is entitled to receive $20,000,000 from the Fund, adjusted for inflation, for expenses in his general election campaign. 26 U.S.C. 9004(a)(1); 2 U.S.C. 441a(b)(1)(B) and (c). After the adjustment for inflation, the total available to each major-party candidate for the 1980 general election campaign will be $29,440,000.

In order to receive any payments from the Fund, a party's candidates for President and Vice President

[4] An individual may also contribute up to $5,000 to any political committee ($20,000 in the case of a committee maintained by a national political party), and such multicandidate political committees may make contributions of up to $5,000 to a candidate or his authorized campaign committee. 2 U.S.C. 441a(a)(1) and (2).

must certify to the Federal Election Commission (hereinafter the "Commission") that they and their authorized campaign committees will not incur campaign expenses in excess of the amount of public funds to which they are entitled under 26 U.S.C. 9004(a)(1) and that they and their authorized committees will not accept private contributions to finance the campaign, except to the extent necessary to make up any deficiency in public funds because of an insufficient balance in the Fund. 26 U.S.C. 9003(b). Because the balance in the Fund will be adequate to pay the full $29,440,000 to which a major-party candidate is entitled in 1980, if the Republican or Democratic candidates for President and Vice President accept public financing, they must limit their campaign expenditures to the $29,440,000 they will receive in public financing and forgo all private contributions.

Private individuals will not be barred, however, from making their own independent expenditures in support of a candidate receiving public financing, 2 U.S.C. 441a(a)(7), or from performing volunteer services for the campaign and incurring incidental expenses of up to $1,000 in doing so. Pub. L. No. 96-187, 93 Stat. 1340 (to be codified at 2 U.S.C. 431(8)(B)(i)(ii) and (iv)). Moreover, under amendments adopted in 1979 to enhance grass roots participation in campaigns (see H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 9-10 (1979)), a state or local committee of a political party may make expenditures, without limitation, for buttons, bumper stickers, brochures and similar campaign materials to be used by volun-

teer supporters of the party's Presidential candidate. Pub. L. No. 96-187, 93 Stat. 1342 (to be codified at 2 U.S.C. 431(9)(B)(viii)). An individual may make a monetary contribution to a state or local committee for the purchase of such materials generally and may, of course, fully participate in a volunteer capacity using these campaign materials.

2. The constitutionality of contribution and expenditure limitations was extensively addressed by this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

a. The Court in *Buckley* sustained the $1,000 limitation on contributions a person may make to a candidate for federal office, finding a constitutionally sufficient justification for the limitation in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25. In the Court's view, Congress could legitimately find this limitation "'critical * * * if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* at 27, quoting *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 565 (1973).

Conversely, the Court concluded that such a limitation "entails only a marginal restriction upon the contributor's ability to engage in free communication" (424 U.S. at 20-21), because a contribution serves as a symbolic expression of support for the candidate that does not increase perceptibly with the size of the contribution. The Court also noted that the limita-

tion imposes no restraint on the contributor's personal freedom to discuss candidates and issues and to associate actively by volunteering his services. 424 U.S. at 21, 28. The Court concluded that the effect of the contribution limitation would merely be to require candidates and committees to raise funds from a greater number of people and to compel people who would otherwise contribute more than the statutory maximum to a candidate to channel their excess resources to independent political expression. *Id.* at 21-22.

Finally, the Court rejected the argument that the contribution limitations work an invidious discrimination between incumbents and challengers, finding that major-party challengers are usually persons who are well known to the electorate and often outspend incumbents. Indeed, to the extent incumbents are more likely to attract large contributions, the Court found that the contribution limitation would actually benefit challengers as a class. In any event, "[s]ince the danger of corruption and the appearance of corruption apply with equal force to challengers and incumbents," the Court reasoned, "Congress had ample justification for imposing the same fundraising constraints on both." 424 U.S. at 33.

b. The statutory provisions before the Court in *Buckley* imposed two distinct limitations on a Presidential candidate's campaign expenditures. Under 18 U.S.C. (Supp. IV 1970 ed.) 608(c)(1)(B), a candidate for President, whether or not he accepted public financing of his campaign, could spend only

$20,000,000 in his general election campaign, with that total to be adjusted for inflation in future years. 18 U.S.C. (Supp. IV 1970 ed.) 608(d). In addition, 26 U.S.C. 9003(b)(1) then provided, as it does now, that in order to receive public financing, a major party's candidates for President and Vice President must certify that they will not incur campaign expenses in excess of the amount of public funds that they are entitled to receive—an amount equal to the same $20,000,000 limitation, as adjusted, that applied to *all* candidates. See 26 U.S.C. 9003(b)(1) and 9004(a)(1); 18 U.S.C. (Supp. IV 1970 ed.) 608(c)(1)(B); *Buckley* v. *Valeo, supra,* 424 U.S. at 191, 204-205. The Court struck down the generally applicable expenditure limitation, but not the limitation to which candidates must agree as a condition of receiving public financing. 424 U.S. at 108-109.

The Court found none of the governmental interests advanced in support of the generally applicable expenditure limitation adequate to sustain it. The major evil associated with rapidly increasing expenditures—alleviating the corrupting influence of large contributions—was, the Court concluded, adequately addressed by FECA's contribution limitation and disclosure provisions. Nor was the equalization of campaign resources an adequate justification, because such resources might properly depend on the size and intensity of the candidate's support and because a compelled equalization of expenditures might serve to handicap a candidate who lacked substantial name recognition at the outset of the campaign. And

the purpose to limit the allegedly skyrocketing costs of political campaigns was thought to be insufficient, because the people must, under the First Amendment, retain ultimate control over the quantity and range of debate in political campaigns. 424 U.S. at 55-57.

But the Court upheld the expenditure limitation imposed as a condition to receiving public financing, stating:

> * * * Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo fundraising and accept public funding.

424 U.S. at 57 n.65. The Court stressed the importance of this spending limitation for major-party candidates who accept public financing in sustaining the public financing provisions against the contention that they unconstitutionally discriminate against candidates of non-major parties who receive less—or no—public funding. The Court noted in this regard that although candidates of non-major parties suffer a denial of the enhancement of opportunity to communicate with the electorate that is afforded publicly funded candidates, candidates eligible for funding "suffer a countervailing denial," because "acceptance of public financing entails voluntary acceptance of an expenditure ceiling." 424 U.S. at 95. "[S]ince any major-party candidate accepting public financing of a

campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates." *Id.* at 99; see also *id.* at 101. The Court also rejected the argument that non-major party candidates' ability to "catch up" with major-party candidates by private fundraising would be hindered by the limitations on individual contributions they can receive. The Court found that this factual assertion was "questionable" on the basis of the record before it and that, in any event, the assertion was answered by the Court's finding of a significant, independent justification for contribution limitations in eliminating real or apparent corruption. See 424 U.S. at 99 n.134.

3. The appeals in Nos. 79-1373 and 79-1375 and the petition in No. 79-1374 grow out of a single complaint filed on June 16, 1978, in the United States District Court for the Southern District of New York by appellants [5] Republican National Committee, the Ripon Society (an organization of politically active adherents to the Republican Party), and two individuals who are registered Republicans and who have participated in past Republican presidential campaigns. Appellants challenged those portions of the Fund Act and FECA that require a major-party candidate for President who chooses to accept public funding to abide by an overall limitation on campaign expenditures and to forgo private contributions.

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[5] The term "appellants" will be used to describe appellants in Nos. 79-1373 and 79-1375 and petitioners in No. 79-1374.

Appellants expressly did not challenge the limitations on *contributions* under FECA. Complaint at 2; App. 8a.[6] They contended, however, that the major-party candidates would be compelled, as a result of the contribution limitations and other considerations, to accept public funding and that the provision in the Fund Act requiring a candidate to agree to abide by the expenditure limitation is an unconstitutional condition on the receipt of public funds. Appelants also alleged that the expenditure limitation disadvantages candidates challenging incumbent Presidents and that provisions of FECA permitting certain political activities by labor unions disadvantage candidates who do not receive the support of labor organizations. Finally, appellants contended that the voluntary expenditure limitation inhibits political communication among candidates, supporters, and voters and grass roots participation in the campaign (J.S. App. 11a).[7]

The district court granted appellants' motion to convene a three-judge court under 26 U.S.C. 9011(b)

[6] "App." refers to the two-volume joint appendix filed in the court of appeals in No. 79-1375.

[7] The Attorney General was named as a defendant because he is charged with receiving information of knowing and willful violations of FECA and the Fund Act from the Commission pursuant to what is now 2 U.S.C. 437g(a)(5)(C) and with enforcing criminal sanctions under FECA and the Fund Act, 2 U.S.C. 441j and 26 U.S.C. 9012. (2 U.S.C. 441j was repealed by Pub. L. No. 96-187, Section 105, 93 Stat. 1354.) The Secretary of the Treasury was named as a defendant because he is charged under 26 U.S.C. 9006 with receiving certifications from the Commission authorizing the payment of public funds to candidates. Complaint at 8; App. 14a.

to consider the constitutional challenge to pertinent provisions of the Fund Act. 461 F. Supp. at 576. Under 2 U.S.C. 437h(a), a different mode of review is mandated to consider constitutional questions under FECA: a single-judge district court is to certify such questions to the court of appeals, sitting en banc.

The single-judge district court in No. 79-1375, sitting jointly with the three-judge district court in No. 79-1373, received evidence and made joint findings of fact on October 12, 1979 (J.S. App. 3a-43a). The constitutional questions in No. 79-1375 were then certified to the en banc court of appeals (*id.* at 64a-66a).

The three-judge district court in No. 79-1373 rejected appellants' constitutional claims and dismissed the complaint (J.S. App. 44a-63a). The en banc court of appeals held that the challenged provisions of FECA do not violate the First, Fifth and Ninth Amendments to the Constitution, "substantially for the reasons set forth in the opinion of the three-judge court" (*id.* at 69a). The appeals to this Court followed those adverse judgments.[8]

Appellants had also invoked the jurisdiction of the district court under 28 U.S.C. 1331 to consider the constitutionality of the pertinent provisions of the Fund Act in the event it should be determined that

[8] The parallel procedures for considering constitutional challenges to FECA and the Fund Act were patterned after the procedures adopted by the United States Court of Appeals for the District of Columbia Circuit in *Buckley* v. *Valeo*, 519 F.2d 817 (1975). See 461 F. Supp. at 576; 79-1373 J.S. App. 68a; *Buckley* v. *Valeo, supra*, 424 U.S. at 9-10 n.6.

the grant of jurisdiction to the district court in 26 U.S.C. 9011(b) over cases brought to "implement or construe" the provisions of the Fund Act does not include actions challenging the Act's constitutionality. 461 F. Supp. at 576-577 n.5.[9] The district court, without reaching the question of its jurisdiction under 28 U.S.C. 1331, dismissed the complaint challenging the constitutionality of the Fund Act for failure to state a claim (79-1374 Pet. App. 1a-2a). The district court relied on the findings of fact and opinion of the three-judge court in No. 79-1373. The notice of appeal was filed on February 19, 1980 (*id.* at 3a-4a), and the appeal was docketed in the court of appeals on February 29, 1980. The petition for a writ of certiorari before judgment in No. 79-1374 was filed on March 7, 1980, along with the jurisdictional statements in Nos. 79-1373 and 79-1375.

ARGUMENT

Appellants' constitutional argument that the limitation on overall expenditures by a candidate who chooses to accept public funding of his campaign for President is unconstitutional is foreclosed by this Court's decision in *Buckley* v. *Valeo*, *supra*, and, in any event, is unsupported by the record. Accordingly, the questions on which the decision of the cause depend are so unsubstantial as not to warrant plenary review. We therefore move that the judgment in No. 79-1373 be affirmed, that the appeal in No. 79-

[9] The repeal of 28 U.S.C. 2282, effective August 12, 1976 (Pub. L. No. 94-381, Section 2, 90 Stat. 1119), would require such a case brought under 28 U.S.C. 1331 to be heard by a single judge.

1375 be dismissed,[10] and that the petition for a writ of certiorari before judgment in No. 79-1374 be denied.[11]

[10] We agree with the Commission (No. 79-1375 Motion to Dismiss or Affirm 7-8) that the appeal in No. 79-1375 should be dismissed for lack of jurisdiction. Appellants' action in the district court was not brought to "construe the constitutionality of any provision of [FECA]." The district court therefore had no jurisdiction over it under 2 U.S.C. 437h(a), and this Court has no jurisdiction over the appeal under 2 U.S.C. 437h(b). Although the amount of the expenditure limitation appellants challenge is established in 2 U.S.C. 441a(b)(1)(B), this reference to FECA is merely incidental, and appellants' constitutional argument should be deemed to be directed solely at the Fund Act's requirement that a candidate agree to adhere to an expenditure limitation and to accept no private contributions as a condition to receiving public funds. Thus, appellants' cause of action should be considered to lie solely within the jurisdiction conferred on a three-judge district court under 26 U.S.C. 9011(b) to "implement or construe" the Fund Act. This would avoid the need for parallel procedings in cases such as this, in which identical issues were decided by the en banc court of appeals in No. 79-1375 and the three-judge district court in No. 79-1373. The Court need not resolve this jurisdictional question, however, because the Court clearly has jurisdiction over the appeal in No. 79-1373, and an affirmance of that appeal would dispose of the constitutional questions in No. 79-1375. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 9-10 n.6.

We do not agree with the Commission (No. 79-1375 Motion to Dismiss or Affirm 9-10 n.6) that the appeal to this Court in No. 79-1375 was untimely because the jurisdictional statement was filed 30 days after entry of judgment by the court of appeals. We read the requirement that an appeal be "brought" in 20 days to mean only that the notice of appeal be filed within that period. R. Stern & E. Gressman, *Supreme Court Practice* § 2.5, at 63 & n.12 (5th ed. 1978).

[11] We agree with the Commission (79-1374 Br. in Opp. 4-6) that the district court had jurisdiction over the claims

1. Despite the Court's decision in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 57 n.65, 108-109, sustaining the requirement that a candidate adhere to a limitation on campaign expenditures and forgo private contributions as a condition to receipt of public funds, appellants argue that this requirement violates the First, Fifth and Ninth Amendment rights of candidates and of individuals who might wish to contribute to and participate in presidential campaigns. The results appellants seek is for major-party candidates to be eligi-

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asserted in No. 79-1374 under 26 U.S.C. 9011(b), that this jurisdiction was exclusive, and that the district court therefore had no jurisdiction over these claims under 28 U.S.C. 1331. (The Declaratory Judgment Act, 28 U.S.C. 2201, is not an independent grant of jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)).

The judicial review section of the Fund Act, 26 U.S.C. 9011(b), grants the district court jurisdiction over any action to "implement or construe" the provisions of that Act and requires such a case to be heard by a panel of three judges. It would be anomalous to conclude that a three-judge district court is required under 26 U.S.C. 9011 to hear issues of statutory interpretation arising under the Fund Act, with a right of direct appeal to the Supreme Court, while a claim relating to the constitutionality of the Act is to be heard by a single-judge court, with only a limited right of direct appeal. We therefore conclude that an action brought to "construe" the constitutionality of the Fund Act is within the grant of jurisdiction in 26 U.S.C. 9011(b). *Clark* v. *Valeo*, 559 F.2d 642, 646-647 & n.3 (D.C. Cir.), aff'd, 431 U.S. 950 (1977); cf. 2 U.S.C. 437h(a) (granting jurisdiction in actions to "construe" the constitutionality of FECA); R. Stern & E. Gressman, *Supreme Court Practice* § 2.15 at 127-128 (5th ed. 1978).

We also believe that this special judicial review provision is exclusive. Cf. *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976). But even if it is not, the constitutional issues appellants raise under the Fund Act are fully presented in the appeal from

ble to receive the full $29,400,000 in public funding provided under 26 U.S.C. 9004 *and* to solicit private contributions and make additional expenditures in an unlimited aggregate amount. This would transform what was intended as "a *substitute* for private contributions," *Buckley* v. *Valeo*, *supra*, 424 U.S. at 99 (emphasis added), into a public supplement to such contributions. Such a subsidy for major-party candidates, without a concomitant limitation on their overall expenditures, would call into question the constitutionality of public financing as it affects nonmajor-party candidates who are not eligible for public financing. *Id.* at 95, 99, 101; see pages 10-11, *supra*.

Striking down the expenditure limitation while leaving public funding intact would also be contrary to the clear intent of Congress, which viewed public financing and a prohibition against private funding as integrally related (see Commission's Motion to affirm in No. 79-1373, at 7 & n.6). It would, moreover, frustrate the salutary purposes of public financing: providing an additional means of eliminating the improper influence of large private contributions on campaigns and candidates, offsetting any adverse effects of contribution limitations, and freeing candidates from the burdens of soliciting private contributions. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 96; S. Rep. No. 93-689, 93d Cong., 2d Sess. 4-5 (1974). One may reasonably assume that Congress would no longer see fit to spend taxpayers' money

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the judgment of the three-judge district court in No. 79-1373. Thus, this case does not present the type of extraordinary circumstances warranting the grant of a writ of certiorari before judgment under Rule 20 of the Rules of this Court.

to fund political campaigns if these governmental interests would not be furthered and if Congress would, accordingly, merely be pouring public contributions on top of private ones. Thus, were appellants to succeed on their constitutional argument, the (perhaps unintended) result might well be the end of public financing of presidential campaigns, an important election reform measure this Court sustained just four years ago. But, as it turns out, appellants have not raised any substantial constitutional objections to the statutory scheme.

2. Appellants contend that a candidate for President is compelled by practical and legal considerations to accept public financing and that the expenditure limitation is an unconstitutional condition on the acceptance of this public benefit. The most important factor appellants cite as inducing the acceptance of public funds is the $1,000 limitation on contributions a person may make to a candidate or his authorized campaign committee, which they assert will prevent a candidate who eschews public financing from obtaining resources equivalent to those of the publicly funded candidate (J.S. 9, 13-15).

Significantly, however, appellants do not question the constitutionality of the $1,000 contribution limitation. Indeed, they concede (J.S. 11-12 & n.4) that large contributions have led to abuses in the past and that limitations "serve the purpose of eliminating corruption or the appearance of corruption." Thus, there is no suggestion here that the contribution limitations themselves are unconstitutional because they prevent candidates who rely on private contributions "from

amassing the resources necessary for effective advocacy." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 21.

The asserted unconstitutionality of the Fund Act therefore depends entirely on appellants' allegations that contribution limitations and certain other factors make public financing a more attractive alternative than relying on private contributions. But if the system of raising funds from private sources subject to limitations on contributions is constitutional, it is illogical to suggest that Congress acts unconstitutionally if it also offers another more attractive alternative. Thus, even assuming that appellants are correct that various considerations will necessarily lead a candidate to accept public funding—and we note that the courts below determined that this assertion was not supported by the record (see pages 20-21, *infra*)—Congress cannot be thought to *abridge* a candidate's constitutional rights by affording him an alternative source of funding that provides more resources and therefore *enhances* his ability to communicate and associate over what it would be if he relied on private contributions.

For the same reason, the expenditure limitation to which the candidate agrees as a condition to receiving public funding cannot be thought to attach an unconstitutional condition to the acceptance of public funds. Because a candidate who accepts public funds would have an enhanced ability to exercise his First Amendment rights as a result of receiving a public benefit, this case is wholly unlike *Perry* v. *Sinderman*, 408 U.S. 593, 597-598 (1972), upon

which appellants rely (J.S. 18), and the cases cited in that opinion, which involved net *restrictions* on the exercise of First Amendment rights as a result of the receipt of public benefits.[12]

Moreover, as the Commission points out (No. 79-1373 Motion to Affirm 10), appellants' factual assertions about the considerations that would lead a candidate to opt for public financing (see J.S. 14-15) depend principally on testimony of Charles Black, an official in the 1976 and 1980 presidential primary campaigns of Ronald Reagan. The district courts found that the application of his analysis to the overall fundraising potential of presidential campaigns rested on "several doubtful assumptions" (J.S. App. 26a).[13]

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[12] Of course, public benefits may be conditioned on certain limitations on the exercise of First Amendment rights where necessary to further significant governmental interests. *Civil Service Commission* v. *Letter Carriers, supra.* The Court held in *Buckley* v. *Valeo, supra,* 424 U.S. at 96, that public financing furthers the significant governmental interests of eliminating the improper influence of large contributions and the need for candidates to devote their energies to fundraising. The expenditure limitation and prohibition on private contributions, of course, are central to fulfilling these purposes of public financing.

[13] The courts found appellants' analysis flawed because it did not take account of fundraising techniques other than direct mail solicitation; erroneously assumed that a candidate could not begin private fundraising until after he was nominated; failed to recognize that a party's candidate might well have greater fundraising potential than would one of several candidates in a fiercely contested primary campaign; underestimated the potential for raising larger contributions; and overstated cash flow problems (J.S. App. 26a-28a). As the courts noted (*id.* at 28a, 50a n.15), the Nixon and McGovern campaigns in 1972 raised $60.2 million and $38.7 million in private contributions, respectively, and appellants made no showing that these totals would have been greatly diminished if contribution limitations had applied.

The courts therefore concluded that appellants had failed to satisfy their burden of showing that "presidential candidates are compelled, as a practical matter, to accept public funding" (*id.* at 28a-29a).[14]

3. Equally without merit is appellants' argument (J.S. 19-33) that a candidate's agreement to limit campaign expenditures and to forgo private contributions when he accepts public financing violates the constitutional rights of individuals who may wish to

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[14] The courts below also rejected appellant's related contention (J.S. 18-19) that the system of public financing coupled with a limitation on expenditures unconstitutionally discriminates in favor of incumbents. The credibility of this assertion is greatly undermined by the fact that the incumbent was defeated in the only presidential election conducted under public financing. In any event, the district courts expressly rejected appellants' contention that the challenger must travel more than the incumbent in order to generate press coverage (J.S. 35a-36a). They found (*id.* at 36a-37a) that the only possible advantages to the incumbent are his ability to use Air Force I for travel and to draw on research and speechwriting services of the Executive Branch and the White House (and even the latter would be reduced to the undetermined extent that the challenger can receive comparable services from volunteers). But these advantages are not affected by public financing, and, when coupled with the myriad of other, highly speculative factors that may aid either an incumbent or challenger in a particular case, there is little indication that the compaign laws as a whole "will consistently harm the prospects of challengers relative to incumbents." *Buckley* v. *Valeo, supra,* 424 U.S. at 33 n.38. See page 8, *supra.*

contribute money to a campaign or otherwise participate in the political process.

With respect to the ability to make monetary contributions, the Court held in *Buckley* v. *Valeo*: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo fundraising and accept public funding" (424 U.S. at 57 n.65). Questions of campaign strategy, including whether to accept private or public funding, are necessarily for the candidate to resolve, cf. *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), and an individual has no constitutional right to make a campaign contribution to a candidate who does not wish to accept it. Thus, as the three-judge court observed (J.S. App. 55a), the complaint of those who might wish to make monetary contributions to a candidate who accepts public funding should be directed to the candidate, not the courts. See *Marchioro* v. *Chaney*, 442 U.S. 191, 198-199 (1979).

Nor do the expenditure limitation and prohibition against acceptance of private contributions affect the ability of individuals to engage in political activity aside from the making of financial contributions to a general election campaign. As the three-judge court observed (J.S. App. 55a), supporters of a candidate "are left with a wide range of ways to express their support."

Supporters may make financial contributions to a candidate during the primary campaign and may make their own independent expenditures in support of a candidate in a general election campaign, *Buck-*

ley v. *Valeo*, *supra*, 424 U.S. at 45-51, as long as those expenditures are not coordinated with the candidate or his authorized committee. The latter restriction is, of course, necessary to prevent circumvention of the limitation on expenditures by the candidate himself. Individuals may also volunteer their services to a campaign without limitation and may incur incidental expenses of up to $1,000 in doing so for such things as travel and lodging or the holding of meetings in a personal residence. Pub. L. No. 96-187, 93 Stat. 1340, 1342 (to be codified at 2 U.S.C. 431(8)(B) and (9)(B)).

The district courts did find (J.S. App. 21a) that there was less "grass roots" activity during the 1976 presidential campaign than in prior years, but it also found that some of this decline may have been attributable to factors other than the federal election laws, such as the decision by candidates and their campaign staffs to stress media advertising rather than local campaign efforts, the failure of candidates to "energize" the electorate, the aftermath of Watergate, and a perhaps understandable caution on the part of campaign officials and individuals operating under the new election laws for the first time (*id.* at 21a-22a). Thus, the courts were uncertain that increasing the total amount of funds available to a campaign would in fact result in the allocation of more money to grass roots activities rather than to additional media advertising (*id.* at 23a).

The courts also found a curtailment of "bottom up" financing of grass roots activity in the 1976 election—

i.e., the contribution of materials or funds in small amounts to finance personal activities undertaken at the local level in coordination with a candidate's campaign (J.S. App. 19a-21a, 23a). This resulted, of course, from the fact that coordinated expenditures of this type would be regarded as prohibited contributions to the campaign. But a number of other alternatives—including volunteering one's services to a campaign utilizing materials furnished by the campaign—are available to an individual who wants to demonstrate his support. The incidental limitation on his personal expenditure of funds for campaign materials is, as noted above, necessary to avoid circumvention of restrictions on the candidate's expenditures.

But whatever merit appellants' argument may have had regarding the effect of the law on grass roots activity and coordinated expenditures by volunteers in the 1976 election, it is clearly without merit now. In an effort to meet the very concern appellants raise, Congress amended FECA in 1979 to provide a mechanism to fund the purchase of posters, bumper stickers, buttons, brochures and similar campaign materials that have traditionally been utilized by grass roots participants in campaigns. Under the Act as amended, state and local committees of a political party may make such purchases without limitation, Pub. L. No. 96-187, 93 Stat. 1340, 1342 (to be codified at 2 U.S.C. 431(8)(B)(x), (9)(B)(viii)), individuals may contribute funds to the committees for

that purpose, and the use of these materials may be fully coordinated with the national campaign.[15]

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[15] There is also no merit to appellants' constitutional argument (J.S. 29-31) based on the exemption from FECA's definitions of "contribution" and "expenditure" of communications between a union and its members and their families and a corporation and its employees and shareholders and their families. 2 U.S.C. 441b(b)(2)(A); Pub. L. No. 96-187, 93 Stat. 1340, 1342 (to be codified at 2 U.S.C. 431(8)(B)(vi) and (9)(B)(iii) and (v)). In the courts below, appellants challenged only the provisions governing union activities, and then only on the ground that these provisions discriminate in favor of a candidate who receives union support, but the district courts found (J.S. App. 42a) that the record "fails to show that presidential candidates supported by labor organizations enjoy substantial advantages over opposing presidential candidates."

Appellants have now abandoned their argument that the union provisions discriminate against certain candidates, and they now contend for the first time that the provisions permitting communications by both unions and corporations discriminate against other persons who do not benefit from a similar exemption. The district courts made no findings of fact on this point, and the Court should not consider it when raised at this late date. In any event, the statutory provisions in question merely reflect a reasonable accommodation of the associational and related First Amendment rights of these entities. See, *e.g.*, *United States* v. *CIO*, 335 U.S. 106, 121 (1948). Unions and corporations have no rights under these provisions with respect to their internal communications that other organizations or associations do not also enjoy. Express exemptions were required only because of the prohibition in 2 U.S.C. 441b(a) against *all* expenditures and contributions by labor organizations and corporations for election campaigns. Appellants' reliance (see J.S. 30-31) on *Police Department* v. *Mosley*, 408 U.S. 92 (1972), is therefore misplaced.

CONCLUSION

The judgment of the district court in No. 79-1373 should be affirmed, the appeal in No. 79-1374 should be dismissed, and the petition for a writ of certiorari before judgment in No. 79-1375 should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1373

REPUBLICAN NATIONAL COMMITTEE, et al.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
THE QUESTIONS PRESENTED BY THIS APPEAL ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT	6
I. The Court upheld the constitutionality of public financing of presidential campaigns in *Buckley* v. *Valeo*	8
II. Appellants' claims that public financing imposes an unconstitutional condition upon candidates and infringes rights of supporters are unsupported	10
III. Appellants' claim that the advantages of incumbency render public financing discriminatory against challengers is unsupported by the record	15
IV. Appellants' claim that the statutes discriminate against candidates not supported by labor organizations is wholly unsupported by the record	17
V. Appellants submitted no evidence in support of their claims that the statutes are overbroad and in violation of the ninth amendment; both claims were rejected by this Court in *Buckley* v. *Valeo*	17
VI. Appellants cannot obtain the relief they seek	18
CONCLUSION	20

Cases: Page

American Communications Association v. *Douds*, 339 U.S. 382 (1950) 11
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 18
Buckley v. *Valeo*, 424 U.S. 1 (1976) 3, 7, 8, 9, 11, 15, 16, 17, 18, 19
Dandridge v. *Williams*, 397 U.S. 471 (1970) 12
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 18
Flemming v. *Nestor*, 363 U.S. 603 (1960) 12
Griffin v. *Illinois*, 351 U.S. 12 (1956) 16
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 18
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 16
Marchioro v. *Chaney*, 442 U.S. 191 (1979) 14-15
Oklahoma v. *Civil Service Commission*, 330 U.S. 127 (1947) 11
Richardson v. *Belcher*, 404 U.S. 78 (1971) 12
Roschen v. *Ward*, 279 U.S. 337 (1929) 16
Ross v. *Moffitt*, 417 U.S. 600 (1974) 16
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 16
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 18
United States v. *Robel*, 389 U.S. 258 (1967) 18
United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) 18
Welsh v. *United States*, 398 U.S. 333 (1970) 19
Williamson v. *Lee Optical*, 348 U.S. 483 (1955) 16
Wyman v. *James*, 400 U.S. 309 (1971) 11

United States Constitution: Page

First Amendment 4, 5, 6, 8, 13, 14, 18
Fifth Amendment 4, 5, 6, 8
Ninth Amendment 4, 5, 6, 8, 17, 18

Statutes:

2 U.S.C. § 431 ..... 2, 4
2 U.S.C. § 431(8)(B)(i) 13
2 U.S.C. § 431(8)(B)(ii) 13
2 U.S.C. § 431(8)(B)(iii) 13
2 U.S.C. § 431(8)(B)(iv) 13
2 U.S.C. § 431(8)(B)(x) 13
2 U.S.C. § 431(8)(B)(xi) 13
2 U.S.C. § 431(8)(B)(xii) 13
2 U.S.C. § 431(9)(B)(viii) 13
2 U.S.C. § 431(9)(B)(ix) 13
2 U.S.C. § 437h 5
2 U.S.C. § 441a(b)(1)(B) 4, 5, 6
2 U.S.C. § 441b 17
18 U.S.C. § 608(c)(1)(B) 9
26 U.S.C. § 9001 ..... 2, 3
26 U.S.C. § 9003 4
26 U.S.C. § 9004 4
26 U.S.C. § 9011(b) 2, 4
26 U.S.C. § 9031 3

Legislative History:

Pub. L. No. 92-225, 86 Stat. 3 (1972) 4
Pub. L. No. 93-443, 88 Stat. 1263 (1974) 4
Pub. L. No. 94-283, 90 Stat. 475 (1976) 4

Page

Pub. L. No. 95-216, 91 Stat. 1655 (1977) 4
Pub. L. No. 96-187, 93 Stat. 1339 (1980) 4, 12, 13
119 Cong. Rec. 14,489 (1973) 7
119 Cong. Rec. 14,718 (1973) 7, 11
119 Cong. Rec. 14,719 (1973) 7, 11
119 Cong. Rec. 14,720 (1973) 7
119 Cong. Rec. 14,722 (1973) 7
119 Cong. Rec. 14,725 (1973) 7, 11
119 Cong. Rec. 14,726 (1973) 7
119 Cong. Rec. 14,729 (1973) 7
119 Cong. Rec. 14,737 (1973) 7, 11
119 Cong. Rec. 14,739 (1973) 7
119 Cong. Rec. 14,828 (1973) 7, 11
119 Cong. Rec. 14,889 (1973) 7
119 Cong. Rec. 15,087 (1973) 7
119 Cong. Rec. 25,985 (1973) 11
119 Cong. Rec. 38,900 (1973) 11
120 Cong. Rec. 8775 (daily ed., March 28, 1974) 7
120 Cong. Rec. 10,546 (1974) 11
S. Rep. No. 93-689, 93d Cong., 2d Sess. (1974) 11, 20
H. Rep. No. 93-1239, 93d Cong., 2d Sess. (1974) 11
H. Rep. No. 96-422, 96th Cong., 1st Sess. (1979) 13
Hearings on S.382 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 92d Cong., 1st Sess. (1971) 11
Hearings on S.1103, S.1954 and S. 2417 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 93d Cong., 1st Sess. (1973) 11

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MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

Appellee Federal Election Commission moves to affirm the decision of the three-judge court on the grounds that the questions presented were correctly decided by the court below and are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinions below, joint findings of fact of the three-judge court and the single judge and the opinion

of the three-judge court, are set forth in appellants' appendix to the jurisdictional statement in No. 79-1373. These opinions are not yet reported. The opinion of the district court convening the three-judge court is reported at 461 F.Supp. 570.

JURISDICTION

This appeal is brought pursuant to 26 U.S.C. § 9011 (b) which provides for appeal to the Supreme Court of a decision of a three-judge court convened to implement or construe any provision of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.* Pursuant to 26 U.S.C. § 9011(b) appellants seek to have the Court expedite its consideration of this case. Section 9011(b) does not require the Court to hear further argument on a case where the questions are so unsubstantial as not to need further argument, and for the reasons set forth in the Argument, *infra,* the Commission opposes appellants' motion to expedite.

STATUTES INVOLVED

This appeal challenges provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.,* and also involves certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* The full text of both statutes is set forth in appellants' appendix to the jurisdictional statement in No. 79-1373.

QUESTIONS PRESENTED

Whether this Court should affirm the unanimous decision of the three-judge court, rendered after full consideration of the issues, that appellants' complaint does not state any claim based on the unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*

Whether this Court should hear further argument where the questions presented by appellants were decided by this Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

STATEMENT OF THE CASE

This case and Nos. 79-1374 and 79-1375 arose from a single complaint which was dismissed by three unanimous courts. In order to avoid unnecessary duplication of argument, the complete statement of the case and the reasons why the decisions of the courts below should be affirmed are set forth fully in this motion only. Additional jurisdictional questions as to Nos. 79-1374 and 79-1375 are addressed separately in the Commission's motion to dismiss or, in the alternative, to affirm in No. 79-1375, and in the Commission's brief in opposition to petition for writ of certiorari in No. 79-1374.

On June 16, 1978, appellants, Republican National Committee, the Ripon Society of New York and two individuals, filed a complaint in the district court seeking declaratory and injunctive relief against certain provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.,* Subtitle H, Chapter 95, Internal Revenue Code (hereafter the "Fund Act")[1] and the Federal Election Campaign Act of

[1] Subtitle H of the Internal Revenue Code includes Chapter 95, the Presidential Election Campaign Fund Act, and Chapter 96, the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031, *et seq.* Although appellants' challenge is limited to the Fund Act (Chapter 95), a decision by this Court holding that expenditure limitation invalid would raise serious implications for

1971, as amended, 2 U.S.C. § 431, *et seq.* (hereafter "FECA").[2] (The Fund Act and FECA are collectively referred to hereafter as the "statutes"). Appellants challenge the constitutionality under the first, fifth and ninth amendments of the requirement that candidates, in order to be eligible to receive public funds under the Fund Act, certify to the Federal Election Commission that they will not incur qualified campaign expenses in excess of the aggregate amount of their entitlement under the Fund Act,[3] and that they have not and will not accept any private contributions except insofar as necessary to make up any deficiency in the Fund. 26 U.S.C. §§ 9003, 9004; 2 U.S.C. § 441a(b)(1)(B).

Appellants filed a motion for convening a three-judge court pursuant to 26 U.S.C. § 9011(b) on September 22, 1978. The three-judge court was convened on January 3, 1979. The Commission filed a motion to dismiss and a motion to certify constitutional questions to the court of appeals *en banc* pursuant to

Chapter 96 which contains the parallel expenditure limitation for the public funding of presidential primary campaigns. Under Chapter 96, a candidate receives matching federal payments for private contributions of up to $250 and agrees to adhere to a $10 million spending limitation. Thus, although there is a spending ceiling for the candidate, individuals are free to make contributions.

[2] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) has been amended as follows: Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655 (1977); Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

[3] $29,440,000.00 for each candidate in 1980.

2 U.S.C. § 437h on February 20, 1979, which were heard by the three-judge court on May 8, 1979. The court ordered the parties to expedite development of a record "in the form of transcripts of whatever depositions are to be submitted plus any statistical proof" for submission of the constitutional issues. Appellants filed their evidentiary submission, a trial memorandum and proposed findings of fact with the three-judge court on June 8, 1979, and on June 18, 1979, appellees filed their evidentiary submission, a brief and proposed findings of fact. Both parties submitted proposed constitutional questions for certification to the court of appeals *en banc*. Appellants' rebuttal submission was filed on June 22, 1979.

On October 12, 1979, the single district judge and the three-judge court issued joint findings of fact, App.[4] at 3a-43a (hereafter "Joint Findings, App. at ——"), and the single judge certified to the court of appeals a question as to the constitutionality of 2 U.S.C. § 441a(b)(1)(B).[5] An expedited briefing schedule was estab-

[4] Citations to the Joint Findings and to the Opinion of the three-judge court are to appellants' appendix in No. 79-1373.

[5] Does 2 U.S.C. § 441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth or Ninth Amendment to the Constitution—

(a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;

(b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidates' campaign) to that campaign;

(c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;

(d) by being overbroad?

lished in the court of appeals by motion of the appellants and consent of the appellees, and briefing was completed on November 28, 1979. On February 5, 1980, the three-judge court issued its opinion, App. at 44a-63a (hereafter "Opinion, App. at ——"), dismissing the complaint insofar as it sought to challenge the constitutionality of the Fund Act. On February 6, 1980, the court of appeals answered the certified questions in the negative, finding that 2 U.S.C. § 441a(b)(1)(B) does not violate the First, Fifth or Ninth Amendments to the United States Constitution. App. at 67a-69a.

The final judgment of the three-judge court was entered on February 13, 1980, App. at 1a-2a, and upon request of appellants, the single judge entered a separate judgment on February 19, 1980. App. in 79-1374 at 1a-2a. Appellants filed their notices of appeal on February 19, 1980, App. at 70a-71a, and their jurisdictional statements in Nos. 79-1373 and 79-1375 on March 7, 1980. In No. 79-1374, appellants filed a petition for pre-judgment certiorari on March 7, 1980. Appellants seek establishment of an expedited briefing schedule and oral argument this term in order that this Court may render its decision before the July 1980 presidential nominating convention.

ARGUMENT

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

Appellants seek to have the Court consider this case on an expedited basis because of the imminency of the 1980 general election. Precisely because of the timing of this appeal, the unanimous decisions of all three

courts below, which fully considered and correctly rejected appellants' claims, the Commission submits that this case is one highly appropriate for summary affirmance by the Court.

Appellants seek to have this Court transform what Congress designed as an optional alternative to private funding of presidential campaigns into a $29,440,000.00 subsidy for major party candidates, Juris. Statement at 12 n.6, even though this clearly would be contrary to the intent of Congress, as this Court noted in *Buckley* v. *Valeo,* 424 U.S. at 99.[8] The courts below provided appellants with a full opportunity to prove their claims, fully considered the issues, and rejected each of appellants' claims both on the grounds that they failed to prove facts sufficient to substantiate their claims and that, even if the record supported their claims, the statutes would not thereby be unconstitutional.

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[8] The legislative history supports the conclusion that public financing as designed by Congress depends upon the prohibition on private funding to achieve its purposes: 119 Cong. Rec. 14,489 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,722 (1973) (remarks of Sen. Biden); 119 Cong. Rec. 14,726 (1973) (remarks of Sen. Schweiker); 119 Cong. Rec. 14,729 (1973) (remarks of Sen. Hart); 119 Cong. Rec. 14,889 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,718 (1973) (remarks of Sen. Mondale); 119 Cong. Rec. 14,720 (1973) (remarks of Sen. Muskie); 119 Cong. Rec. 15,087 (1973) (remarks of Sen. Humphrey); 120 Cong. Rec. 8775 (daily ed., March 28, 1974) (remarks of Sen. Hollings); 119 Cong. Rec. 14,719 (1973) (remarks of Sen. Biden); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Schweiker); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Clark); 119 Cong. Rec. 14,737 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,739 (1973) (remarks of Sen. Kennedy); 119 Cong. Rec. 14,828 (1973) (remarks of Sen. McGovern).

Appellants' case is based solely on the experience of the 1976 election, the first in which public financing of presidential campaigns operated. The courts below accurately characterized the "evidence," finding that it does not support appellants' claims, and that, in any event, it is of limited value since based upon only one election:

> The 1976 campaign was a single election, and the strategies adopted by the candidates and the budgetary impact of those strategies, do not necessarily reflect the optimal strategies and spending patterns available to the candidates in that campaign [and] cannot be utilized to predict strategies and spending decisions in future campaigns when the issues, personalities and political climate will undoubtedly be different.

Joint Findings, App. at 35a.

I. The Court Upheld the Constitutionality of Public Financing of Presidential Campaigns in *Buckley* v. *Valeo*.

The constitutionality of public financing was one of four major issues considered by this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Part three of the Court's four-part opinion contained a comprehensive review of the Fund Act (and Chapter 96), upholding its constitutionality. 424 U.S. at 85-109. This Court specifically reviewed the Presidential Election Campaign Fund Act under the first, fifth and ninth amendments.[7]

[7] The following question was certified to this Court and answered in *Buckley* v. *Valeo*, 424 U.S. at 108:

> 5. Does any statutory provision for the public financing of political conventions or campaigns for nomination or election to the Presidency or Vice Presidency violate the rights of one or more of the plaintiffs under the First or Ninth Amendment, the Due Process Clause of the Fifth Amendment, or Article I, Section 8, Clause 1, of the Constitution of the United States?
>
> Answer: NO.

Buckley v. *Valeo*, 424 U.S. at 86, 93. Appellants' challenge in this case is to the expenditure limitation to which candidates who opt for public funding agree to adhere. Yet the Court's analysis of public financing in *Buckley* was premised on the existence of that limitation and the Court's decision specifically upheld its constitutionality. 424 U.S. at 57 n.65, 88 n.120, 95 n.129, 101, 103 n.139, 109.

Indeed, this Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.

424 U.S. at 57 n.65. Appellants contend that this decision is mere dictum, and they are essentially asking this Court to reconsider its decision in *Buckley*. The three-judge court rejected appellants' contention and held that the conclusion upholding the expenditure limitation was central to this Court's ruling:

> The plaintiffs argue that this passage is mere dictum. We do not agree. It was because of the expenditure limitations that the Court upheld the campaign fund against the constitutional challenge of minor parties.

Opinion, App. at 51a n.6.

The *Buckley* decision, throughout its analysis of public funding, relied upon the expenditure limitation, finding it central to the Court's holding that minor parties are not disadvantaged, 424 U.S. at 95 n.129, 99, 101, 103 n.139, finding it severable from the overall spending ceilings contained then in 18 U.S.C. § 608(c)(1)(B), 424 U.S. at 88 n.120, finding that the

absence of private contributions to major party candidates may improve the fundraising abilities of non-major party candidates, 424 U.S. at 94 n.128, 99, and finding that one of the primary purposes served by public financing is to free candidates at their option from the rigors of fundraising (which would be an impossible goal to achieve without a total ban on private contributions and without spending limits). 424 U.S. at 91, 96.

II. Appellants' Claims That Public Financing Imposes An Unconstitutional Condition Upon Candidates and Infringes Rights of Supporters Are Unsupported.

The courts below found that neither the statutes nor the evidence support appellants' contention that candidates are compelled to accept public financing and to adhere to the expenditure limitation.[8] Joint Findings, App. at 28a-29a; Opinion, App. at 50a. The courts correctly rejected appellants' premise that it is impermissible for Congress to offer candidates a choice

[8] Appellants contend that candidates are forced to choose between "limited" private financing and "limited" public funds. Juris. Statement at 10. This characterization of the choice was explicitly rejected by the courts below which concluded that a "candidate remains free to engage in *unlimited* private funding and spending instead of limited public funding." Opinion, App. at 51a (emphasis added). The courts further rejected appellants' evidence as to the lack of a private funding alternative, which was based on the testimony of one individual who was not even qualified as an expert fundraiser. The courts found "that Black's analysis of the overall fundraising potential of presidential campaigns rests upon several doubtful assumptions," Joint Findings, App. at 26a, and rejected appellants' analysis of the cash flow problems of a privately funded campaign, finding that "media, one of the largest and most critical campaign expenditures, must be paid for only several days, not several months, in advance." Joint Findings, App. at 28a.

between two methods of exercising the same constitutional right. Opinion, App. at 52a. The conditions attached to public financing do not infringe the first amendment rights of candidates, Opinion, App. at 53a, and moreover, compelling governmental interests support those conditions and would have led the courts to uphold them even had appellants demonstrated that there were some incidental restrictions.[9] Opinion, App. at 54a. Where congressional spending furthers first amendment values, as does public financing, *Buckley* v. *Valeo,* 424 U.S. at 93, Congress' power to condition its terms is quite extensive. *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127 (1947); *American Communications Association* v. *Douds,* 339 U.S. 382, 417 (1950) (Frankfurter, J., concurring). *See Wyman* v.

[9] These interests—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising—were identified by this Court. *Buckley* v. *Valeo,* 424 U.S. at 91, 96. *See* 119 Cong. Rec. 14,718 (1973) (remarks of Sen. Mondale); 119 Cong. Rec. 14,719 (1973) (remarks of Sen. Biden); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Schweiker); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Clark); 119 Cong. Rec. 14,737 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,828 (1973) (remarks of Sen. McGovern); S. Rep. No. 93-689, 93rd Cong., 2d Sess. 5 (1974); *Hearings on S.382 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration,* 92d Cong., 1st Sess. 78 (1971); *Hearings on S.1103, S.1954 and S.2417 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration,* 93d Cong., 1st Sess. 207 (1973); H. Rep. No. 93-1239, 93d Cong., 2d Sess. 3-4 (1974); 119 Cong. Rec. 38,900 (1973) (remarks of Sen. Pastore); 120 Cong. Rec. 10,546 (1974) (remarks of Sen. Hart); *Hearings on S.1103, S.1954 and S.2417 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration,* 93d Cong., 1st Sess. 70 (1973); 119 Cong. Rec. 25,985 (1973) (remarks of Sen. Long).

James, 400 U.S. 309 (1971); *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *Dandridge* v. *Williams,* 397 U.S. 471, 486 (1970); *Flemming* v. *Nestor,* 363 U.S. 603 (1960).

Appellants argue that the choice whether or not to accept public financing is a difficult one because the certainty of the sum as well as other advantages make it such an attractive alternative. From this they conclude that there is no real choice for a candidate but to opt for a publicly financed campaign.[10] The courts rejected that conclusion, finding that, if the public monies provide a candidate with substantial advantages, then it follows not that the statutes are unconstitutional, but rather that public financing enhances and enlarges a candidate's ability to exercise his or her first amendment rights.[11] Opinion, App. at 53a-54a.

The corollary to the expenditure limitation is the agreement by the candidate not to accept private con-

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[10] Appellants contend that Congress set the contribution limit at $1,000 believing that it would be low. In support of this argument, they cite to the report prepared by the Kennedy School, Juris. Statement at 11 n.5, which concluded that the limit was set too low in 1974. This very study was commissioned by the Committee on House Administration to evaluate the impact of FECA, and demonstrates that Congress is attentive to the impact of the Act. Indeed, Congress' responsiveness to unintended consequences of FECA is further evidenced by the 1979 Amendments to FECA, Pub. L. No. 96-187 (1980), which increased the ability of individuals to make contributions coordinated with publicly financed presidential campaigns. *See* note 12 *infra.*

[11] Although the courts below recognized that a candidate may encounter some risk in rejecting public funding, they further found that "it is a risk that can be measured on the basis of the candidate's fundraising experience during the primaries. Moreover, the candidate may have excess funds from his primary campaign . . .". Joint Findings, App. at 27a.

tributions. That agreement is essential to furtherance of the purposes of public financing because a candidate may spend only his entitlement under the Fund Act. Opinion, App. at 54a. *See* note 6 *supra.* Appellants assert, however, that as a result of a candidate's decision not to accept private contributions, the first amendment rights of individuals are infringed because they may not make contributions directly to a candidate who chooses public financing. The statutes do not restrict the abilities of individuals to participate in political campaigns, but rather provide other avenues for the funding of such individual activities.[12] In addi-

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[12] Contrary to appellants' misstatements of the law, the Act provides alternative avenues for individuals to participate in the funding of so-called local "grass roots" activities, by exempting funds spent on certain volunteer activities from the definitions of "contribution" and "expenditure". 2 U.S.C. §§ 431(8)(B)(i), (ii), (iii), (iv), (x), (xi), (xii), and 431(9)(B)(viii), (ix). Many of the examples set forth by appellants as "illegal," Juris. Statement at 20, would fall within these exemptions. Others, unless independent of a campaign, must be funded by the campaign or by a party committee.

Appellants' statements that the statutes prohibit individuals from spending modest amounts on a campaign for any political activities are thus simply untrue. Indeed, the 1979 Amendments to the Act, Pub. L. No. 96-187 (1980), which became effective on January 8, 1980, increased from $500 to $1,000 the exemptions which permit individuals to hold campaign volunteer activities in their homes or community rooms, in full coordination with a candidate's campaign. The Amendments also increased from $500 to $1,000 the exemption which permits individuals to travel on behalf of a campaign, paying their own expenses for transportation, food and lodging.

In addition, the Amendments specifically created a new exemption to permit state and local party organizations to fund "grass roots" activities, fully coordinated with presidential campaigns, without limit. 2 U.S.C. §§ 431(8)(B)(x) and (9)(B)(viii); H. Rep. No. 96-422, 96th Cong., 1st Sess. 9-10 (1979). Although this

tion, the courts noted the many avenues, other than the making of direct contributions, available to individuals in a publicly funded campaign, and found that supporters are left with a wide range of ways to express their support, including certain activities coordinated with the presidential campaign. Opinion, App. at 55a.

The courts further rejected appellants' conclusion that the voluntary choice by a candidate to forego private contributions results in infringement of first amendment rights of potential contributors.[13] A candidate has the right to choose the manner of funding his or her campaign and may decide not to accept private contributions without infringing any rights of supporters. Opinion, App. at 55a. "As in *Marchioro*

provision has not yet been operative during a presidential campaign, appellants seemingly negate its potential effect. Juris. Statement at 23 n.13. Moreover, despite their contention that there are numerous individuals desirous of making contributions to a candidate and who wish to engage in grass roots activities, they dismiss this new exemption stating that funding will not be available. Yet the entire purpose of the new exemption is to permit those individuals, on whose behalf appellants bring this suit, to make contributions to party committees for grass roots activities and to participate in those activities in full coordination with candidates' campaign committees.

[13] Appellants misleadingly assert that the parties and the court agree that the impact of the statutes on "grass roots" activities was "dramatic." Juris. Statement at 22. On the contrary, the courts found a variety of factors other than the challenged statutes which contributed to any perceived decline in such activities in 1976, finding that "[e]ven prior to 1976, presidential campaigns emphasized mass media and television in particular, at the expense of grass roots activities," Joint Findings, App. at 21a, and that "[t]he *impact of these budgetary policies* [of the presidential campaigns in 1976] upon various forms of grass roots activities was *dramatic*." Joint Findings, App. at 16a (emphasis added).

v. *Chaney,* 442 U.S. 191, 199, 99 S.Ct. 2243, 2248 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the courts." Opinion, App. at 55a. To suggest otherwise would lead to the conclusion that a candidate may not accept the choice to campaign without private monies and without indebtedness to any supporters or fundraisers.

Even if the contribution restriction were viewed as one imposed by government rather than as the choice of a candidate as to which type of campaign he or she prefers,

> The public interest in enacting a public funding program and in limiting coordinated contributions to effectuate that program is a considerable one. These limitations 'do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.' 424 U.S. at 29.

Opinion, App. at 56a.

III. Appellants' Claim That the Advantages of Incumbency Render Public Financing Discriminatory Against Challengers Is Unsupported by the Record.[14]

The court below acknowledged, as this Court noted in *Buckley* v. *Valeo,* 424 U.S. at 31-33, that even assuming the advantages of incumbency, and that they may have a significant effect on a particular election, the public financing scheme is a neutral one which does

[14] Appellants have not fully argued this claim to the Court, and it is unclear whether they are appealing its dismissal by the courts below.

not, and should not, attempt to equalize such pre-existing differences in strengths between candidates and parties.[15] Opinion, App. at 58a. *See Ross* v. *Moffitt,* 417 U.S. 600, 611-16 (1974); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 24 (1973); *Griffin* v. *Illinois,* 351 U.S. 12, 23 (1956). Nor is a reform statute unconstitutional because it might have gone further than it did. *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966); *Williamson* v. *Lee Optical,* 348 U.S. 483, 489 (1955); *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929).

The contentions made by appellants, Juris. Statement at 18-19, that challengers need spend more to overcome the advantages of incumbency are wholly unsupported by the record and by the findings of the district courts. For example, the courts found that the record demonstrates that once nominated, both challenger and incumbent receive relatively equal media coverage, irrespective of their specific campaign activities.[16] Joint Findings, App. at 35a-36a. Thus, the courts correctly concluded "that the Fund Act does not unlawfully discriminate in favor of incumbent candidates against challengers or deny equal protection to presidential candidates." Opinion, App. at 59a. Indeed, in the only election conducted with public financing, the incumbent was defeated.

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[15] The record in this case supported a finding of only two advantages of incumbency—the use of Air Force I and the value of speechwriting and research facilities of the Executive Branch—which amount to far less than the advantages supported by the record in *Buckley* where this Court refused to sustain a similar challenger discrimination claim. 424 U.S. at 30-35.

[16] Indeed, it was appellants' own exhibit which the courts used to reject these claims, finding that it "belies [their] contention travel to generate news coverage." Joint Findings, App. at 36a.

IV. Appellants' Claim That the Statutes Discriminate Against Candidates Not Supported by Labor Organizations Is Wholly Unsupported by the Record.[17]

The courts found that appellants failed to show that, by engaging in their protected right of internal communication with their membership, and by engaging in non-partisan voter registration and get-out-the-vote drives, labor organizations provide any substantial advantages to certain candidates over others, that Democratic candidates were favored over Republicans, or that, even if they were, Republicans could not and did not obtain comparable support from other groups such as corporations, which have—protected by the statute—and may exercise, the same rights under 2 U.S.C. § 441b. Opinion, App. at 62a; Joint Findings, App. at 41a.

Even had appellants demonstrated that labor support provided substantial advantage to Democratic candidates over others, the courts below would correctly have rejected any claim of discrimination based upon the failure of the neutral public financing statute to equalize differences in level of support for certain candidates by one type of special interest group. Opinion, App. at 61a-62a. *See* cases cited *supra* at 16.

V. Appellants Submitted No Evidence in Support of Their Claims That the Statutes Are Overbroad and in Violation of the Ninth Amendment; Both Claims Were Rejected by This Court in *Buckley* v. *Valeo*.

As noted, these facial constitutional claims were rejected by this Court in *Buckley* v. *Valeo,* 424 U.S. at

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[17] Appellants have not fully argued this claim to the Court, and it is unclear whether they are appealing its dismissal by the courts below. This claim was not certified to the Court of Appeals.

90, 95-96. *See* note 7 *supra*. To establish a claim of overbreadth, it must be demonstrated that, in permissibly prohibiting certain activities, a statute proscribes other activities protected by the first amendment, *United States* v. *Robel*, 389 U.S. 258 (1967), *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), and that the alleged overbreadth is "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-15 (1973). *Cf. United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973). When infringement of ninth amendment rights is asserted, the issue is whether the Congress has the granted power to enact the challenged legislation. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 96 (1947); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Appellants submitted no evidence in support of these claims, and the courts below correctly dismissed them as wholly without merit because the Fund Act furthers compelling governmental interests in providing the public funding alternative, *Buckley* v. *Valeo*, 424 U.S. at 93, and because Congress' power to implement such an alternative was specifically upheld by this Court in *Buckley* v. *Valeo*, 424 U.S. at 90. Opinion, App. at 62a-63a.

VI. Appellants Cannot Obtain the Relief They Seek.

Appellants seek to have this Court create a $29,440,000.00 subsidy for major party candidates. Such relief is impossible for the following reasons: (1) the expenditure limitation is an integral part of public financing as implemented by Congress, and (2) grave doubt would arise as to the constitutionality of public financing as applied to minor parties were it not for the expenditure limitation.

That public financing was intended to be an alternative system of funding—not a supplement to private financing—is stated in the Fund Act's legislative history, *see* note 6 *supra*, and was affirmed by this Court. "Public funding for candidates of major parties is intended as a *substitute* for private contributions. . .". *Buckley* v. *Valeo*, 424 U.S. at 99 (emphasis added). The legislative history of the Presidential Election Campaign Fund Act demonstrates that, after eliminating the expenditure limitation and contribution prohibition of public financing, it is impossible to conclude that "the legislature would have been satisfied with what remained." *Welsh* v. *United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring, quoting from *Champlin Mfg. Co.* v. *Corporation Commission*, 286 U.S. 210, 235 (1932)).

Moreover, the Court concluded in *Buckley* that, were it not for the expenditure limitation contained in the Fund Act, there would be great doubt as to the constitutionality of public financing as applied to minor parties. "[S]ince any major party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major party candidates." *Buckley* v. *Valeo*, 424 U.S. at 99. This Court underscored the importance of the expenditure limitation when it noted that "Subtitle H does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately and additionally imposes an expenditure limit." *Buckley* v. *Valeo*, 424 U.S. at 95 n.129. Without the expenditure limitation there is substantial likelihood that the statutory scheme under challenge would be open to attack on grounds of discrimination against minor and

new party candidates, since it would give major party candidates a publicly-subsidized head start in the race for campaign funds.[18]

Appellants seek to have this Court draft a statute which Congress did not pass, and which itself would pose serious constitutional questions. This Court should affirm the unanimous decisions of the three courts below and find the expenditure limitation to be an integral and permissible part of public financing and hold it to be not severable.

CONCLUSION

For the foregoing reasons, the decisions of the courts below should be summarily affirmed.

Respectfully submitted,

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[18] This fear was expressed by Congress, which consciously designed the system to insure fairness for minor parties. S. Rep. No. 93-689, 93d Cong., 2d Sess. 8-9 (1974).

Supreme Court, U.S.
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MAR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-1373, 79-1374, 79-1375

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants-Petitioners,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees-Respondents.

On Appeals from the United States District Court for the Southern District of New York and from the United States Court of Appeals for the Second Circuit and On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* COMMON CAUSE, DAVID COHEN, AND NAN WATERMAN IN SUPPORT OF APPELLEES' MOTIONS TO AFFIRM

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INDEX

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE CHALLENGED PROVISIONS DO NOT ABRIDGE FIRST AMENDMENT RIGHTS	5
A. The Challenged Provisions Do Not Violate the First Amendment Rights of Presidential Candidates	5
B. The Public Financing Provisions Do Not Abridge the First Amendment Rights of Would-Be Contributors	8
II. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE CHALLENGED STATUTES DO NOT VIOLATE THE PLAINTIFFS' FIFTH AMENDMENT RIGHTS	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Adderley v. *Florida*, 385 U.S. 39 (1966) 10
Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*
Cameron v. *Johnson*, 390 U.S. 611 (1968) 10
Cox v. *Louisiana*, 379 U.S. 559 (1965) 10
Federal Election Commission v. *Central Long Island Tax Reform Immediately Committee*, No. 79-3014 (2d Cir. Feb. 5, 1980) 5
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) .. 10
Marchioro v. *Chaney*, 442 U.S. 191 (1979) 8
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 13
Rowan v. *Post Office Department*, 397 U.S. 728 (1970) 8
Washington v. *Davis*, 426 U.S. 229 (1976) 13

STATUTES:

Federal Election Campaign Act, 2 U.S.C. § 431, *et seq.*, as amended by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) ..... *passim*
2 U.S.C. § 431(8)(B)(i) 10
2 U.S.C. § 431(8)(B)(ii) 10, 12
2 U.S.C. § 431(8)(B)(iii) 12
2 U.S.C. § 431(8)(B)(iv) 10, 12
2 U.S.C. § 431(8)(B)(x) 11
2 U.S.C. § 431(8)(B)(xi) 11
2 U.S.C. § 431(9)(B)(viii) 11
2 U.S.C. § 431(9)(B)(ix) 11
2 U.S.C. § 431(17) 10
2 U.S.C. § 434(e) 5
2 U.S.C. § 437h 2, 4, 5
2 U.S.C. § 441a(b) 3
2 U.S.C. § 441a(b)(1)(B) 2, 3
2 U.S.C. § 441a(c) 3
2 U.S.C. § 441b 13
2 U.S.C. § 441d 5
Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) .. 3, 10, 11

TABLE OF AUTHORITIES—Continued

Page

Internal Revenue Code, Subtitle H, Chapter 95, 26 U.S.C. §§ 9001-13 ..... *passim*
26 U.S.C. § 9003(b) 3
26 U.S.C. § 9004 3
26 U.S.C. § 9004(a) 3
26 U.S.C. § 9011(b) 4, 5

MISCELLANEOUS:

Fed. R. Civ. P. 52(a) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-1373, 79-1374, 79-1375

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants-Petitioners,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees-Respondents.

On Appeals from the United States District Court for the Southern District of New York and from the United States Court of Appeals for the Second Circuit and On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE* COMMON CAUSE, DAVID COHEN, AND NAN WATERMAN IN SUPPORT OF APPELLEES' MOTIONS TO AFFIRM

INTEREST OF *AMICI*

Common Cause and two of its officers, David Cohen and Nan Waterman, submit this Brief *amicus curiae* with

the consent of the parties.[1] Common Cause is a nonprofit membership corporation. It has participated actively in legislative consideration of federal election campaign reforms and in litigation concerning them, including *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Amici* participated in this case in the courts below.

QUESTION PRESENTED

The following question was certified to the court of appeals pursuant to 2 U.S.C. § 437h:

> "Does 2 U.S.C. § 441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth, or Ninth Amendment to the Constitution—
>
> (a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;
>
> (b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidate's campaign) to that campaign;
>
> (c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;
>
> (d) by being overbroad?"

Appendix to Jurisdictional Statement in No. 79-1373 ("App.") 66a.

The three-judge district court considered whether Chapter 95 of Subtitle H of the Internal Revenue Code

[1] We have lodged with the Clerk of the Court letters of consent from all parties.

("Subtitle H"), 26 U.S.C. §§ 9001-13, violated the Constitution for these reasons. Both courts answered the question in the negative and dismissed the case. In these circumstances, the question presented here is:

> Whether the courts below correctly found that the system of public financing of presidential general election campaigns established by the Federal Election Campaign Act and Subtitle H does not violate appellants' First, Fifth, or Ninth Amendment rights.

STATEMENT OF THE CASE

Subtitle H provides for public financing of presidential general election campaigns as an optional alternative to private fundraising. Each major party presidential nominee may at his option receive an amount that began in 1974 as $20 million and is adjusted annually for changes in the Consumer Price Index.[2] That amount will be approximately $29 million in 1980. Under Subtitle H and the Federal Election Campaign Act ("FECA"),[3] a candidate who elects public financing may not incur campaign expenses above the amount he is entitled to receive from the public fund or accept contributions to defray his expenses (except to the extent that the public fund is insufficient to provide the amount to which he is entitled).[4] A candidate who rejects public funding may raise as much as he can and spend all he can raise from private sources.[5]

[2] 26 U.S.C. § 9004; *see* 2 U.S.C. § 441a(b)(1)(B), (c). Minor party candidates can receive lesser amounts. 26 U.S.C. § 9004(a).

[3] 2 U.S.C. §§ 431, *et seq.*, as amended by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

[4] 2 U.S.C. § 441a(b); 26 U.S.C. § 9003(b).

[5] *See* Joint Findings of Fact ("Joint Findings") at 7, App. 10a.

Appellants do not challenge the constitutionality of public financing itself; they challenge only the expenditure and contribution limits that go with it. They seek "the right to solicit, receive and spend both public and private campaign funds, without any limitations, even though the alternative of public financing made available by Congress to candidates was clearly 'intended as a *substitute* for private contributions.'" [6]

After development of an extensive factual record, a single-judge court and a three-judge district court convened pursuant to 26 U.S.C. § 9011(b) entered detailed Joint Findings of Fact. The single-judge court then certified a constitutional question to the court of appeals sitting *en banc* pursuant to 2 U.S.C. § 437h. The three-judge court and the *en banc* court of appeals both unanimously rejected appellants' claims and dismissed the case.[7]

ARGUMENT

Appellants ask this Court to review on an expedited basis a statutory scheme that the Court has already once upheld, *Buckley* v. *Valeo*, 424 U.S. 1, 90-104 (1976), and to rewrite the statute to permit major party presidential candidates to use public funds as a supplement to, rather than a substitute for, private fundraising. The courts below unanimously rejected appellants' claims as contrary to the evidence, to logic, and to decisions of this Court. This Court need not give plenary—let alone emergency—consideration to claims that appellants spent more than a year developing, but in which eleven federal

[6] Opinion of the Three-Judge Court ("Opinion") at 4-5, App. 49a, *quoting Buckley*, 424 U.S. at 99 (emphasis added by the three-judge court).

[7] The Second Circuit's *en banc* memorandum dismissed the case "substantially for the reasons set forth in the opinion of the three-judge court . . . ." App. 69a. The single-judge court also entered an order dismissing the case.

judges found not a whisper of merit.[8] *Amici* therefore support appellees' motions for summary affirmance.[9]

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE CHALLENGED PROVISIONS DO NOT ABRIDGE FIRST AMENDMENT RIGHTS.

A. The Challenged Provisions Do Not Violate the First Amendment Rights of Presidential Candidates.

Appellants claim that the challenged provisions violate the First Amendment because (a) the Republican candidate is allegedly compelled to accept public financing and (b) eligibility for public financing is conditioned on compliance with expenditure and contribution limits. Without dissent, the lower courts rejected that claim. Their decisions rest on several independent bases.

First, the courts found that appellants had "failed to show that presidential candidates are compelled, as a practical matter, to accept public funding." [10] In *Buckley*,

[8] The court of appeals that unanimously upheld the public financing system in this case cannot be accused of insensitivity to First Amendment values. On the day before it adopted the three-judge court opinion, the *en banc* Second Circuit dismissed a Federal Election Commission complaint, ruling unanimously that, in light of First Amendment concerns, 2 U.S.C. §§ 434(e) and 441d should be given a much narrower reading than that advocated by the Commission. *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, No. 79-3014 (2d Cir. Feb. 5, 1980). In a concurring opinion in that case, Chief Judge Kaufman, joined by Judge Oakes, expressed his view that election laws generally pose a danger of interference with free expression. Yet even they found not the slightest constitutional problem in the provisions challenged in this case.

[9] Since this Court clearly has jurisdiction of this case under 26 U.S.C. § 9011(b) or 2 U.S.C. § 437h, or both, it need not unravel here the jurisdictional tangles presented by those statutes. *Buckley*, 424 U.S. at 9 n.6.

[10] Joint Findings at 26, App. 28a-29a.

this Court three times referred to public financing as "voluntary." [11] The courts below, finding the evidence consistent with that characterization, concluded that "neither the statutes under attack nor the evidence adduced by [appellants] supports [their] contention." [12] The courts below found on the present record, as this Court ruled in 1976:

> "Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, *and this avenue is still open to all candidates.*" Opinion at 5, App. 50a, *quoting Buckley*, 424 U.S. at 101 (emphasis added by three-judge court).

Appellants' case here rests on an attempt to reargue factual allegations unanimously rejected below.[13]

Second, the courts below properly found meritless appellants' claim that the challenged provisions unconstitutionally condition receipt of public funds on the sacrifice of a constitutional right. The "unconstitutional condition" doctrine has no applicability to this case, because the challenged provisions do not require a candidate to sacrifice any right. Subtitle H merely offers the candidate an optional alternative source of funds. It can only increase his speaking power or leave it unchanged. It cannot re-

[11] 424 U.S. at 57 n.65, 95, 99.

[12] Opinion at 5, App. 50a.

[13] Appellants could prevail in this Court only if the findings below were clearly erroneous. Rule 52(a), F.R.Civ.P. But the courts below rejected appellants' principal evidence on this point as resting on "several doubtful assumptions." Joint Findings at 23-25, App. 26a-28a. Appellants stress the courts' finding that "the risk of taking private funding only to discover that an amount exceeding the public grant cannot be raised is a great one . . . ." Jurisdictional Statement in No. 79-1373 ("Jurisdictional Statement") at 15. But appellants can find solace in that statement only by ignoring the end of it, which they omit to quote. The sentence ends: "but it is a risk that can be measured on the basis of the candidate's fundraising experience during the primaries." Joint Findings at 24, App. 27a.

duce his speaking power, for in that case he would simply decline the public fund. As the three-judge court said,

> "The Fund Act merely provides a presidential candidate with an *additional* funding alternative which he or she would not otherwise have and does not deprive the candidates of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding. Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will *enhance* the candidate's powers of communication and association." Opinion at 8, App. 53a (emphasis in original).

That conclusion is of course entirely consistent with this Court's statement in *Buckley* that "Subtitle H furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93.

Third, the courts below also found that compelling federal interests amply justify the restrictions that accompany acceptance of public financing. As this Court recognized in *Buckley*, Congress provided for optional public financing of presidential general elections to serve at least three important and valid purposes—"to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." 424 U.S. at 91.[14] The conditions Congress imposed on acceptance of public financing are "necessary to the effectiveness of [the] program," for "[i]f a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated." [15]

[14] *See* Opinion at 9, App. 54a.

[15] *Id.* at 9-10, App. 54a.

Finally, appellants' claim is squarely foreclosed by *Buckley*, where this Court said with respect to the precise claim appellants now raise:

> "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." 424 U.S. at 57 n.65.

Appellants acknowledged below that this statement is squarely contrary to their claim.[16] Their assertion that this passage was "dictum" [17] is incorrect. It was because of the expenditure limitations that this Court upheld the presidential campaign fund against the discrimination claims made in *Buckley* by minor parties.[18]

B. The Public Financing Provisions Do Not Abridge the First Amendment Rights of Would-Be Contributors.

Appellants claim that the contribution restrictions that result from a presidential candidate's decision to accept public funding abridge the freedom of speech of would-be contributors. The courts below unanimously rejected that contention, again on multiple grounds.

First, the courts below concluded that since the decision to reject private contributions is made by the candidate, would-be contributors' complaints are appropriately directed to the candidate, not the courts. *Marchioro* v. *Chaney*, 442 U.S. 191, 199 (1979); *Rowan* v. *Post Office*

[16] Transcript of Hearing on May 8, 1979, at 45; Brief for Plaintiffs in courts below at 21.

[17] Jurisdictional Statement at 13-14 n.8.

[18] 424 U.S. at 97; *see* Opinion at 6 & n.6, App. 51a & n.6.

Department, 397 U.S. 728, 738 (1970) ("no one has a right to press even 'good' ideas on an unwilling recipient").[19] As the three-judge court explained:

> "There is nothing improper or unusual in recognizing that a candidate rather than his or her supporters should control the method of financing the campaign. . . . [I]t would be unreasonable to preclude a candidate who prefers public financing from using it instead of private financing merely because some supporters believe that the decision deprives them of the ability to contribute to the candidate's election in the precise way they would if the campaign were privately financed." Opinion at 10-11, App. 55a-56a.

Again, this Court had reached the same conclusion in *Buckley*:

> "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising . . . ." 424 U.S. at 57 n.65.

A candidate's decision to "forgo private fundraising" necessarily precludes supporters from making contributions to his campaign. To suggest, as appellants do,[20] that the quoted statement has no relevance because this Court was not thinking of the rights of the contributor but only of the rights of the recipient is to accuse this Court of remarkable mental gymnastics.

Second, the courts below found that would-be contributors have "a wide range of ways to express their support." [21] Appellants' contention that the public financing provisions prevent participation "unless someone else both agrees to the activity and funds it" [22] is simply

[19] Opinion at 10-11, App. 55a.

[20] Jurisdictional Statement at 23-24 & n.14.

[21] Opinion at 10, App. 55a. *See Buckley*, 424 U.S. at 20-22.

[22] Jurisdictional Statement at 23.

contrary to that finding. Individuals may spend without limit to support their chosen candidate in ways that are not coordinated with the candidate's campaign.[23] They may volunteer their services without limit and engage in a significant range of other activities in coordination with a campaign.[24] The challenged provisions restrict only the making of direct or indirect monetary contributions to a presidential candidate who does not want to receive them.[25]

Third, appellants contended that there was inadequate support from the campaigns for "grass roots" activities during the 1976 election. But the courts found that appellants had failed to establish a causal connection between public financing and the level of "top-down" support for grass roots activities in the campaigns. The courts said:

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[23] *See* 2 U.S.C. § 431(17). *Buckley* recognized that the limitation on "coordinated" expenditures is necessary to avoid evasion of direct contribution limitations. 424 U.S. at 46-47 n.53.

[24] The FECA expressly provides that individuals may contribute uncompensated personal services, fully coordinating their actions with the campaign, without limitation. 2 U.S.C. § 431(8)(B)(i). Moreover, the FECA expressly permits individual supporters to incur certain expenses traditionally associated with grass roots activities, in full coordination with a candidate's campaign. Under the Act, as recently amended by Pub. L. No. 96-187, 93 Stat. 1339 (1980), supporters may incur coordinated expenses to entertain in, or make telephone calls or send letters from, their own home, up to a limit of $1,000. 2 U.S.C. § 431(8)(B)(ii). And they may incur travel expenses in working for the campaign, up to a separate $1,000 limit. 2 U.S.C. § 431(8)(B)(iv).

[25] A statute that restricts a particular activity, for good and substantial reasons, does not violate the First Amendment merely because some individuals, who have any number of ways of expressing their opinions, say they would prefer to do so by engaging in the restricted activity. *See Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965) (regulation of time, place, and manner of speech).

> "It is, however, somewhat uncertain whether increasing the amounts of funds to be spent by the candidates' national committees would have resulted in the allocation of additional funds to local activities or the allocation of even greater amounts to mass media at the expense of local activities." Joint Findings at 19-20, App. 23a.

The trend toward reliance on mass media began long before public financing was enacted and was not caused by the challenged statutes.[26] And reports of the 1980 primary campaign indicate an apparent resurgence of grass roots participation.

Moreover, Congress recently amended the FECA to stimulate grass roots activities.[27] The new law expressly exempts from the definitions of "contribution" and "expenditure" a number of expenditures related to grass roots activity and raises the dollar limits applicable to other exemptions.[28] The new legislation renders appel-

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[26] The courts below quoted and relied on an admission to that effect by appellant Republican National Committee's Chairman Brock:

> "Certainly the methodology of politics has changed enormously since the advent of mass communications, mass media and primarily television. But the change has been because the people took an easy route and became dependent upon television and both parties allowed their root structure to begin to dry up because *even without the law* that does exist to presidential campaigns, as it does now, there is a finite limit to what a candidate can raise in almost any campaign." *Quoted in* Joint Findings at 18, App. 21a-22a (emphasis added).

[27] Pub. L. No. 96-187, 93 Stat. 1339 (1980).

[28] The new legislation generally exempts "the payment by a State or local committee of a political party of the cost of campaign material (such as pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party." *Id.*, 2 U.S.C. § 431(8)(B)(x), (9)(B)(viii) (1980). It also exempts state and local party funding of voter registration and get-out-the-vote efforts. 2 U.S.C. § 431(8)(B)(xi), (9)(B)(ix). Finally, it

lants' "grass roots" claims all but moot, while demonstrating that the fine-tuning of these statutes is the function not of the courts but of Congress.

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE CHALLENGED STATUTES DO NOT VIOLATE THE PLAINTIFFS' FIFTH AMENDMENT RIGHTS.

Appellants have all but abandoned in this Court their claims that the challenged statutes violate the Fifth Amendment by discriminating against major party candidates (a) who challenge incumbents or (b) who lack substantial support from labor organizations. The courts below had no trouble dismissing those claims on factual and legal grounds.

The courts below properly found that the appellants had failed either to prove that incumbents have substantial net advantages or to "demonstrate that the challenged provisions will inevitably disadvantage *all* challengers." [29] (Appellants' claim stumbled mightily, of course, on the fact that the incumbent President lost the only election conducted with public financing.) Moreover, the courts concluded that even if such advantages had been proved, "a public funding law should not be required to remedy pre-existing inequities between candidates." [30] As this Court concluded in rejecting similar allegations in *Buckley*:

> "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on

raises from $500 to $1,000 the exemptions for residential entertainment expenses, sales of food and beverages by vendors, and travel expenses. 2 U.S.C. § 431(8)(B)(ii), (iii), (iv). *See* note 24 *supra*.

[29] Joint Findings at 32, App. 35a (emphasis in original).

[30] Opinion at 14, App. 58a.

> its face imposes evenhanded restrictions." 424 U.S. at 31.

Appellants utterly failed to prove their labor claim, and the courts below accordingly concluded that:

> "the evidence adduced by plaintiffs fails to show that presidential candidates supported by labor organizations have enjoyed any substantial advantage over opponents; that labor unions would necessarily support the Democratic presidential candidate or that, if they did so, any advantage would not be offset by corporate support for the Republican candidate. In short, the statutory provisions are neutral on their face and the claim of discrimination in favor of candidates having labor union support, being based on speculation rather than facts, must be dismissed for failure to demonstrate any denial of free speech or equal protection to presidential candidates and their supporters." Opinion at 17, App. 62a.[31]

Finally, both Fifth Amendment claims should be rejected for a reason the courts below did not need to reach. Even if these facially neutral statutes did have a different impact on different candidates, they would not be unconstitutional for that reason alone, absent evidence (of which there is none whatever) that they were enacted with a purpose to discriminate. *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *Washington* v. *Davis*, 426 U.S. 229 (1976).

[31] Appellants attempt to switch gears in this Court and complain about alleged discrimination against ordinary citizens in favor of labor unions and corporations. Jurisdictional Statement at 29-31. That effort is misdirected. Any such discrimination (and none has been proved) would not result from operation of the challenged statutes, but from 2 U.S.C. § 441b, which governs corporate and union activity. But appellants have explicitly stated that they are not challenging section 441b. Memorandum of Law of Plaintiffs in Opposition to the Motion to the Single District Judge to Certify Jurisdictional Questions at 3 (Mar. 23, 1979).

CONCLUSION

For the reasons stated above, the motions to affirm should be granted.

Respectfully submitted,

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OCTOBER TERM, 1979

No. 79-

REPUBLICAN NATIONAL COMMITTEE, *et. al.*,
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Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Table of Contents

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
ARGUMENT	
1. Compelled Adherence to Expenditure Limitations	6
2. Restrictions on Grass Roots Activity	7
3. Prohibition on Small Contributions	9
4. Impact on Pending Legislative Proposals	12
5. The Unconstitutional Conditions Doctrine	13
CONCLUSION	15

Table of Authorities

Cases	Page
American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973)	2, 11
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	11
Buckley v. Valeo, 424 U.S. 1 (1976)	passim
Corbitt v. New Jersey, 439 U.S. 212 (1978)	14
Elrod v. Burns, 427 U.S. 347 (1963)	13
Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, ___ F.2d ___ (2d Cir., Feb. 4, 1980)	2
Keyishian v. Board of Regents, 385 U.S. 589 (1976)	14
McCulloch v. Maryland, 4 Wheat. 316 (1819)	7
Mills v. Alabama, 384 U.S. 214 (1966)	1, 9
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	1, 9
Mott v. Federal Election Commission, Civil Action No. 79-3375 (D.D.C.)	3
New York Civil Liberties Union v. Acito, 459 F. Supp 75 (S.D.N.Y. 1978)	2

Cases	Page
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	1, 9
Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947)	14
Perry v. Sindermann, 408 U.S. 593 (1972)	14
Sherbert v. Verner, 374 U.S. 398 (1963)	14
Snepp v. United States, ___ U.S. ___, 48 U.S.L.W. 3527 (Feb. 19, 1980)	14
Socialist Workers Campaign Committee v. Jennings, 567 F.2d 1133 (D.C. Cir. 1977)	2
Staats v. ACLU, 422 U.S. 1030 (1975)	2
United States v. National Committee for Impeachment, 469 F.2d 1135 (2d. Cir. 1972)	2
Vanesco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) aff'd 423 U.S. 1041	2
Whitney v. California 274 U.S. 357 (1927)	4
Wyman v. James, 400 U.S. 309 (1971)	14

Statutes — Page

Federal Election Campaign Act of 1971 As Amended . . . . . passim

2 U.S.C. §437h 5

2 U.S.C. §441(b)(7) 8

26 U.S.C. §9003(b)(2) 8

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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REPUBLICAN NATIONAL COMMITTEE, et. al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

et. al.,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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Brief of the American Civil Liberties Union, Amicus Curiae, in Support of the Jurisdictional Statement

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This brief is submitted to urge the Court to note probable jurisdiction and to accord plenary review to the important constitutional issues the case raises.

Interest of Amicus Curiae*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the principles contained in the Bill of Rights to the Constitution. Primary among those guarantees are the First Amendment protections of freedom of speech and association. The ACLU agrees with this Court that rights of speech and association have their "fullest and most urgent application precisely to the conduct of campaigns for public office," Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). Except perhaps in erecting a barrier to prior restraints, the First Amendment's most important office is to insure that political speech in general - and campaign speech in particular - will be as uninhibited and unrestricted as possible. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Mills v. Alabama, 384 U.S. 214 (1966); Buckley v. Valeo, 424 U.S. 1 (1976).

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* Letters of consent from all parties to the filing of this amicus curiae brief are being lodged with the Clerk of the Court.

Because of the importance of political speech as the critical safeguard for a host of civil liberties values, the ACLU has viewed with deep concern the effect on First Amendment interests of the various campaign "reform" laws enacted in the last decade. Although we shared the concerns about political corruption that prompted passage of those laws - particularly the Federal Election Campaign Act of 1971 and the various amendments thereto (hereafter "FECA") - we came to the considered organizational conclusion that such laws did more harm than good to First Amendment interests.

The ACLU has vigorouly supported and participated in litigation to test the validity of campaign reform legislation that is in our view inconsistent with First Amendment values. See United States v. National Committee For Impeachment, 469 F.2d 1135 (2d Cir. 1972); American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), vacated as moot sub. nom., Staats v. ACLU, 422 U.S. 1030 (1975); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), aff'd, 423 U.S. 1041 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Socialist Workers Campaign Committee v. Jennings, 567 F.2d 1133 (D.C. Cir. 1977); New York Civil Liberties Union v. Acito, 459 F. Supp. 75 (S.D.N.Y. 1978); Federal Election Commission v. Central Long Island Tax

Reform Immediately Committee, ___ F.2d ___ (2d Cir., Feb. 4, 1980) (en banc); Mott v. Federal Election Commission, Civil Action No. 79-3375 (D.D.C.). Because of these cases, we have been forced to grapple with the seemingly inherent tension between campaign reform efforts and First Amendment principles, and we have tried to be receptive to methods that could reconcile the clash between reform and free speech.

The issues in this case present the same clash of values. In our governing bodies, the ACLU has debated long and hard the very issues posed by this case. We do not assert that public funding is, per se, inconsistent with the First Amendment and civil liberties principles. We do assert that certain restrictions that are imposed as a condition of obtaining public funding are inconsistent with the First Amendment and civil liberties principles. We have concluded that the values of public funding can be preserved without abridging free speech or civil liberties principles by using public subsidies to provide a floor for funding campaign activities without imposing a ceiling that limits such activities. Whether such an approach is good public policy is for others to decide. What commends it to us is that it embodies the sound civil liberties principle that where speech activity is

asserted to pose societal evils, the First Amendment response should not be to restrict or condition the speech itself, but rather to supply the remedy of "more speech." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

Regrettably, that is not the premise of the public funding provisions of the FECA at issue in this case. With respect to presidential candidates, those provisions combine to impose severe restrictions on the receipt of public funding. With respect to supporters of publicly-funded candidates, the effect on spontaneous grass-roots activity has been crippling, and the prohibition on even the most modest campaign contributions is total. The statute at issue affects political speech by and about presidential candidates, and thus cuts close to the core of the interests protected by the First Amendment. The resolution of this case will also bear critically on proposals to provide public funding for all federal political campaigns. We think the court below failed to appreciate the gravity of those issues and the magnitude and nature of the restrictions on campaign speech imposed by the challenged provisions of the Act. For the following reasons, the issues raised by this case require plenary consideration by this Court.

ARGUMENT

Our purpose at this point is a limited one; it is to suggest to the Court why plenary consideration of the issues raised by this case is warranted. In the area of campaign controls, many challenges to statutory or regulatory restrictions are rooted in First Amendment concerns, because many of those restrictions burden or prohibit campaign speech. Perhaps that is one reason why the Congress, in enacting the FECA, established the extraordinary judicial review procedures contained in 2 U.S.C. §437h, which require expedited consideration and disposition by this Court of the issues involved in this case. Although §437h does not mandate plenary consideration of those issues, we submit that plenary consideration is imperative in this case. The statutory provisions at issue systematically affect the raising and spending of money in presidential campaigns. These laws have a profound impact on presidential candidates and the parties they represent. But even more importantly, from our perspective, public funding provisions seriously cripple or totally prohibit political activity at the grass roots level and by small contributors. Given these consequences, the issues surely warrant careful and full review by this court.

1. Compelled Adherence to Expenditure Limitations

The major 1974 Amendments to the FECA had two basic substantive purposes that were in our view at odds with First Amendment values. The first was to place severe restrictions on the amount that any individual could contribute to a political candidate, ostensibly to eliminate the corrupting influence of large campaign contributors. In Buckley, this Court upheld such contribution limits, and candidates and campaigns have struggled under those limitations ever since. The other purpose of the 1974 law was to impose overall spending limitations on all federal political campaigns, ostensibly because there was "too much" campaign speech, campaigns had become "Romanesque political extravagances," Buckley v. Valeo, 519 F.2d 821, 897, and equality principles justified regulating the quantity of speech in which candidates should engage. These latter purposes, however, cut too deeply at the core of First Amendment values, and Buckley ruled direct expenditure limitations unconstitutional.

In our view, the public funding provisions attempt to achieve indirectly the same result this Court held unconstitutional when sought to be secured directly, namely, limitations on the quantity - and thereby the

quality and nature - of campaign speech. Although other justifications for the funding conditions have been suggested - freeing candidates from the burdens of private fund-raising and the obligations which might ensue - the continued existence of contribution limits, not challenged here, secure the latter goal, while the burdens of private fund-raising have been replaced by the burdens of accounting for and struggling under the spending limitations attached to the public subsidy. In addition, on an almost daily basis, newspaper accounts indicate the difficulties the current presidential campaigns are experiencing in effectively communicating their views to the public within the subsidies available to them. In short, we believe the various rationales advanced to support the statute are a pretext, masking the true congressional motivation of compelling presidential candidates to adhere to prescribed spending limits. Cf. McCulloch v. Maryland, 4 Wheat. 316, 423 (1819). Such legislation should be subject to the closest scrutiny by this Court.

2. Restrictions on Grass Roots Activity

The record in this case demonstrates how the public funding/expenditure limitation scheme has fundamentally altered the nature and quality of presidential campaigns. The

funding scheme has had two major effects on the quality and range of campaign activity. First, the low ceilings on permissible expenditures dictate a heavily-centralized, media-oriented campaign. The consequence is that few if any funds are available from the national campaigns to support the essentials of traditional grass roots political activity: local storefronts, rallies, mailings, canvassings, campaign literature, phone banks - all of the indicia of citizen participation that used to be the hallmark of American presidential campaigns. The other effect on grass roots activity is that once a presidential candidate has accepted public funds, no one may make any "contribution" to such a candidate. 26 U.S.C. §9003(b)(2). "Contribution" is defined not only as a donation made directly to a campaign, but also as any expenditure of funds made "in cooperation, consultation, or concert with" a publicly-funded campaign. 2 U.S.C. §441(b)(7). As a result, local grass roots supporters who wish to expend their own funds to support a presidential candidate must remain totally isolated from and "uncoordinated" with that campaign. Even a 10-cent phone call to the state campaign headquarters to purchase a supply of bumper strips is a prohibited "coordinated"expenditure and is unlawful under the Act.

The combination of these two effects, predictably enough, has resulted in a virtual drying up of grass roots campaigning. The vital, spontaneous local activity which for so long characterized our presidential campaigns has been removed from the political landscape, leaving, in its place, arid and sterile media-centered campaigns. The demographics of advertising have replaced the politics of participation. Such a result is not only bad public policy, it also flies in the face of this Court's teaching that the critical mission of the First Amendment is to insure robust speech about candidates for public office, see New York Times Co. v. Sullivan, and that the importance of such speech is magnified during the critical days and weeks preceding an election. Mills v. Alabama, 384 U.S. 214 (1966); Monitor Patriot Co. v. Roy, supra.

3. Prohibition on Small Contributions

Under the public funding scheme, a presidential candidate who accepts funding for the general election, whether "voluntarily" or not, thereby prohibits anyone from making even the most modest monetary contribution to his presidential campaign. This Court in Buckley recognized that making a contribution to the political candidate of one's choice constitutes "the symbolic expression of support" for a candidate,

424 U.S. at 21, and involves important associational rights: "making a contribution, like joining a political party, serves to affiliate a person with a candidate." Id., at 22. "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" Id., at 65-66. Although in Buckley this Court upheld the $1,000 contribution limit, it did so because it found that contributions of more than that amount did not significantly intensify the speech and associational rights involved and did implicate countervailing concerns with corruption or the appearance thereof. Here, however, the scheme does not just restrict the incremental speech or associational values reflected by a contribution in excess of $1,000; rather it precludes the exercise of such symbolic and associational rights at all, by completely prohibiting even a $1.00 contribution to a publicly-funded candidate.

Apart from voting itself, making a small contribution to the candidate of one's choice is among the most fundamental acts of political participation in which a citizen can engage. At least the public funding matching grant scheme at the primary election stage permits

this important form of political speech and association to occur. But the general election funding seheme prohibits it completely.

The response of the court below was that the infringement of the small contributor's First Amendment interests was the product not of government coercion, but of the candidate's "choice" to forgo private financing and accept public funding. Even accepting the premise - which we do not - that the candidate's choice is voluntary, and not the product of coercion attributable to legal and practical inhibitions imposed on a privately-financed campaign, it remains highly questionable to permit the government to delegate to the candidate the authority to impose a systematic veto on the symbolic and associational rights of his supporters who wish to make contributions to him. Cf., Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); ACLU v. Jennings, supra, 366 F. Supp. at 1048-1054 (invalidating FECA provision that, as part of a scheme to limit candidate expenditures for mass media advertising, effectively permitted candidates to veto any advertisement "on behalf of" any candidate).

4. Impact on Pending Legislative Proposals

Plenary review of the decision below is imperative for another reason. The issues in this case directly affect communication to the public by presidential campaigns. That alone is sufficient to warrant full consideration by this Court. But the decision below, if summarily upheld, will have direct ramifications on pending legislative proposals seeking to extend the public financing schemes at issue herein to House and Senate elections as well as to state and local campaigns. Although many of the constitutional issues raised by conditions imposed upon public funding of these various campaigns would be the same as the questions raised here, there are significant variations which might affect the resolution of those issues. Different kinds of fund-raising problems might alter the analysis of whether candidates are, in fact, compelled to accept public funding and spending or contribution limits attached thereto. The advantages of incumbency in congressional and state elections might have a different impact on assessing the public funding scheme. Questions concerning the appearance of corruption or the problems of reliance on private financing might vary as well.

Proponents of these various proposals will surely point to the decision below as upholding the constitutionality of public funding schemes that condition the receipt of funds on the imposition of spending ceilings and the prohibition of any private funding. Given the ripple effect the decision below is likely to have on these various proposals, it is important for this Court fully to consider the constitutional issues tendered in this case.

5. The Unconstitutional Conditions Doctrine

Finally, this case raises important issues that go beyond the area of campaign financing. Those issues cluster around the problem of unconstitutional conditions. At the heart of the decision below is the ruling that a condition otherwise unconstitutional - the limitation on campaign expenditures and the prohibition of private contributions, see Buckley v. Valeo, supra - can be imposed upon the receipt of campaign subsidies, if not in general, at least where compelling interests are thereby served. This Court has generally held that "the denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." Elrod v. Burns, 427 U.S.

347, 361 (1976); see also, Sherbert v. Verner, 374 U.S. 398 (1963); Keyishian v. Board of Regents, 385 U.S. 589 (1976); Perry v. Sindermann, 408 U.S. 593 (1972). To be sure, this Court's application of the unconstitutional conditions doctrine has been less than unwavering. See Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947); Wyman v. James, 400 U.S. 309 (1971); Corbitt v. New Jersey, 439 U.S. 212 (1978); and most recently, Snepp v. United States, ___ U.S. __, 48 U.S.L.W. 3527 (Feb. 19, 1980).

The ACLU has long been concerned with the conditioning of public funds or benefits upon the surrender or limitation of protected liberties. This case clearly implicates such issues, both in terms of campaign financing and a host of other civil liberties areas as well. We are concerned about whether the decision below correctly applied the doctrine to the scheme at issue. But we are no less concerned about the implication of that ruling for areas far removed from campaign financing. Given those potential implications in a host of constitutional areas, we think plenary review by this Court is required.

CONCLUSION

For these reasons, probable jurisdiction should be noted, and the Court should give plenary consideration to the issues in the case.

Respectfully submitted,

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